National Symposium on Women, Law and the Administration of Justice

Colloque national sur la femme, le droit et la justice

Recommendations from the Symposium

Vancouver, British Columbia
June 10-12, 1991

Volume II

Department of Justice Canada
Ministère de la Justice Canada

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For convenience, the masculine pronoun is used in this document to refer to either male or female where the context does not clearly indicate one or the other.

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FOREWORD

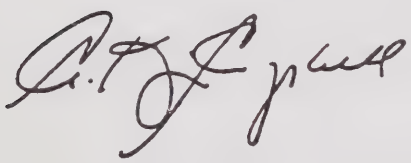
It is with great pleasure that I present the first two volumes of the report of the National Symposium on Women, Law and the Administration of Justice which I hosted in Vancouver on June 10 -12, 1991.

The National Symposium was an unique event in Canadian law reform. All who participated came away with a new and more profound understanding of the ways in which law and the administration of justice have a particular impact on women in our society. All of us also came away with a renewed sense of hope that change will occur, strengthened and supported by the tremendous energy and good will shown by those who participated.

These documents represent an important step towards the realization of our shared goal of gender equality in the Canadian justice system. They reflect the dedicated efforts of the many Canadians who participated in the symposium process, both in preparatory meetings and as speakers and participants in the Symposium itself.

By releasing these documents, it is my hope that the message of the National Symposium and the important lessons that were learned there will be broadened to include in the process of consultation and reform many more of the thousands of Canadians - both women and men - who work daily to create a justice system which better reflects the realities of the lives of women in Canada, in all our diversity.

I look forward to continuing this journey with you.



A. Kim Campbell
Minister of Justice and
Attorney General of Canada

NATIONAL SYMPOSIUM ON WOMEN, LAW, AND THE ADMINISTRATION OF JUSTICE

INTRODUCTION TO THE NATIONAL SYMPOSIUM SERIES

The National Symposium on Women, Law and the Administration of Justice was held in Vancouver, British Columbia between June 10 and 12, 1991. This event brought together for three days almost 300 invited participants from a broad spectrum of experiences, disciplines and regions of the country to debate and discuss a wide range of issues concerning gender equality in law and the administration of justice in Canada. Through a series of preparatory meetings, symposium organizers and participants developed an agenda based on the input and experience of experts from across the country.

The event culminated in the development of a large number of recommendations for change calling for action on the part of governments, organizations and individuals. Symposium organizers and participants alike understood that the Symposium and the recommendations generated there must be viewed as only one step in the journey moving us closer to the goal of gender equality in the Canadian justice system.

Further steps have already been taken during the intervening year. To name only a few:

- All of the recommendations of the Symposium have been shared with senior officials of Provincial and Territorial Departments of Attorney General to be considered by the Working Group on Gender Equality as its members developed proposals for Attorneys General to promote gender equality;

- The federal Department of Justice has undertaken a review of litigation affecting women's equality rights; and

- Several departmental consultation efforts (notably that on Bill C-49 [Rape shield] which was tabled in December 1991) were carried out in a new and inclusive way.

VOLUME ONE: PROCEEDINGS OF THE SYMPOSIUM

The Proceedings of the National Symposium are presented in Volume One. The document includes all background documentation and information provided to the participants, the full agenda of the three days, all speeches and addresses as delivered at the Symposium.

VOLUME TWO: RECOMMENDATIONS FROM THE SYMPOSIUM

The National Symposium was organized to facilitate discussion and allow participants to develop recommendations in three general areas or tracks. Each general area was, in turn, divided into three sub-tracks as follows:

The Substantive Law

- Criminal law
- Family law
- Tax Law

The Legal Process

- Access to Justice for Women
- Court Process
- Sentencing

Work in the Legal Professions

- Selection Processes
- Education and Training
- Gender and Work

The participants at the National Symposium worked long and hard to develop recommendations to address issues of gender equality and justice in each of the identified areas. Participants chose one sub-track on the basis of their interest and expertise and stayed within this group for all work sessions over the course of the Symposium. The difficult task of moving from issue identification to the development of recommendations for action was facilitated in each group by an expert non-government volunteer. At the close of the event, a brief summary of the discussion and recommendations was presented at a Plenary session by the Track Moderator.

Volume Two contains the summary of discussions and recommendations as produced and approved by the participants in each sub-track. As the sub-groups approached their task in their own way, the reader will note a great deal of variability among the sub-track summaries as well as some duplication of recommendations. This is not surprising, given that the issues being addressed frequently have common roots and are not easily separated. Nevertheless, the summaries and recommendations are presented as they were written and approved in order to respect the integrity of the process in which those at the Symposium participated.

By releasing Volumes One and Two of the National Symposium Series, the Minister of Justice, the Honourable Kim Campbell is taking another step in the process of promoting gender equality in the justice system. It is hoped that the material contained in these two volumes will provide an opportunity for further discussion and reflection.

VOLUME THREE: ACTION PLAN ON GENDER EQUALITY

Volume Three, to be released separately, will serve two purposes. First, it will provide the Department of Justice an opportunity to respond to the recommendations of the National Symposium and to any further input generated by the release of Volumes One and Two. Second, it will contain the Action Plan of the Department of Justice on Gender Equality.

It is hoped that the National Symposium Series will provide a basis for ongoing consultation and policy discussions in the subject areas already identified as well as provide an impetus for further policy analysis and development on gender equality issues in areas of law and the administration of justice not included in the current documents.

I

GENDER AND THE SUBSTANTIVE LAW

- Criminal Law (Track A.1)

- Family Law (Track A.2)

- Tax Law (Track A.3)

TRANSCRIPT - AS DELIVERED

SUMMARY OF "GENDER AND THE SUBSTANTIVE LAW"

presented by
- MAUREEN MALONEY -
DEAN OF LAW
UNIVERSITY OF VICTORIA

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

JUNE 12, 1991
VANCOUVER, B.C.

It is a great privilege but a great responsibility to be the substantive law moderator -- not to mention a very daunting task, given that I have to summarize three incredibly important and wide-ranging substantive law tracks in 20 minutes. I will do my best. However, I recognize that some of you will feel that I have distorted your experiences, your ideas and your feelings. I regret that that will happen. Please feel free to set the record straight at the end. For those of you who do not have the time to do so, I really do feel -- and apologize in advance -- that I will have to do that. You have many experiences, but unfortunately I have only one voice.

I will start with the criminal law track. The criminal law group, like others, recognizes the impossibility of listing their many recommendations in the time allotted. In addition, they fear that individual recommendations would be distorted if they were not put in the context of the overall framework of the group's discussion. Accordingly, they chose to have recounted the overall framework and process necessary for ridding the criminal law of its destructive biases.

With respect to the overall framework, the criminal law group affirmed that if one is to meaningfully address inequality and oppression through an examination of criminal law, there must be explicit acknowledgement of the material reality of poverty and racism, as well as disabilities and sexual orientation. They echoed the many important recommendations that were made by the plenary speakers, particularly on racism and poverty, and those recommendations they felt must not be lost, for they are essential to changing our criminal law and our criminal justice system.

Not all the recommendations that came forward from the criminal group accept that the criminal justice system and the criminal law should be a "given" at all. Indeed, some recommendations were for overall structural change. These included a recommendation for a separate aboriginal justice system to be established and run by aboriginal people. Other recommendations were of a specific and short-term nature. For example, one recommendation was for the abolition of preliminary inquiries, provided that there is mandatory full disclosure by the Crown and police with sanctions for lack of disclosure.

Accountability was another very important theme for the criminal law group: not only of those involved in the justice system, but the accountability of the Minister of Justice to follow through on the important work that has been done over the last two days. There must be a record of the proceedings so that participants may ensure their recommendations are accurately presented and that they have ownership of their own words.

A final word was said about process in the criminal law group, as substance can never be truly understood without it. One of the many unwritten achievements of the last two days for the criminal law group, and I think others like it, was that for the first

time, in many instances, a group of people including activists, judges, academics and politicians were able to sit together, speak together and perhaps for the first time truly listen to each other. That process has just started and we urge the Minister to remember that this is an important step. But it is only a first step. It must be followed by others so that, as was so eloquently put by a First Nations woman in the criminal law group, "we may walk what we talk."

The family law group was also concerned about the lack of time available to discuss complex and interrelated issues. Of special concern to them was the fact that they did not have enough time to discuss some issues at all. These included gender bias, the gap between legal equality and social equality, the need to accommodate cultural differences, the interrelationship between immigration and family law, and restrictions on women's mobility rights in the context of custody.

Five delegates of that group recommended that sexual orientation of either parent not be a factor in access and custody determinations. They also recommended that same-sex couples be included in all family law legislation, and that there be a prohibition against discrimination on the basis of sexual orientation in all human rights legislation.

With the understanding that the group was for the most part merely identifying issues of concern, and not in all cases recommending solutions, the group did discuss the following large areas: violence in the family; children, including custody, support and access; and the economic consequences of divorce. Fourthly, they came up with a plan of action with respect to follow-up from this conference and accountability. I will deal very briefly with highlights from these individual groups.

In regard to violence in the family, the family law track felt that there was a need for education, particularly for immigrant groups, and suggested that an information package on family violence should be given to immigrant groups on entry into the country. They also discussed and made recommendations with respect to the exclusive possession of the home that should take into account the issue of violence; that it should be made easier for women to stay in their homes and for the batterer to leave. This right should also be available in common-law relationships.

There were additional recommendations with respect to restraining orders and custody and access. The group was concerned that research be conducted into the correlation of spousal and child battery, there being some indication that once the wife is removed from the home the daughters then become the subjects of violence. Funding is also required for front-line resources for battered women.

The family law track also recognized that in non-aboriginal society, life activities tend to be segmented, which they are not in aboriginal groups. Aboriginal groups wish to get back to a more holistic approach instead of constantly tinkering with the present system. There must be more responsibility given to the community to resolve their own family disputes. Aboriginal communities need to look at their roots and take back responsibility for dispute resolution in the family. The group recommended that research be initiated into a tribal dispute resolution mechanism for family law disputes.

The second area of study was children. In particular, the group felt that the "friendly parent rule" should be repealed. It sets up a presumption in favour of continued contact with both parents; a presumption which can be extremely detrimental in cases concerning violence. In particular, it silences women who have experienced violence or whose children have been abused because they are afraid of losing custody. Instead, research should be done into ascertaining what actually constitutes "the best interests of the child."

In addition, supervised access court orders were also considered. It was felt, in particular, that when supervised access court orders were given facilities should be provided to allow access and safe houses for drop-off and pick-up. These transfer and access facilities should be staffed by professionals and be open during office and non-office hours.

With respect to mediation, the group recommended that there be no mandatory mediation with respect to the resolution of custody disputes. Mandated mediation goes contrary to the philosophy of community-based dispute resolution and can be particularly harmful where violence has taken place. Voluntary mediation can be helpful in certain circumstances.

The third major area was the economic consequences of divorce. In this area, there were many recommendations, but the group stressed that social assistance programs should be improved so that they focus on other factors than unemployment. In addition, there was consensus that the current system of property division and economic support following divorce has the effect of impoverishing women. The group felt strongly that more work had to be done on creative solutions such as the award of more lump sums, the division of professional licences and certificates, and the present level of child support. The group recommended that a working group be set up to study issues relating to the economic consequences of divorce. This group should be reflective of the participants of this symposium and be racially, culturally and regionally sensitive. In addition, maintenance and enforcement programs must be improved, particularly the collection of arrears.

Finally in this area, the issue of pensions was addressed. There was unanimous support that Health and Welfare be required to distribute notification to women regarding the availability of pension funds for women. It was also recommended that the split of the Canada Pension Plan (CPP) be automatic. It was also recommended that studies be conducted into the possibility of mandatory pension splitting in employer-funded pension plans. There should be studies in the area of survivor benefits; these benefits should survive divorce. Pension benefit splitting should also apply to common-law relationships.

Finally, they developed a five-point plan of action which I think will be reflected by most of the groups and certainly the three groups with which I was in contact. First, there should be a working group on family law policy to tackle issues on an in-depth basis. The federal-provincial-territorial working group on gender equality should meet with a variety of feminist groups that have already done research in this area and formulate recommendations. Thirdly, every year, the Minister of Justice should report to the participants of the symposium as to what has been accomplished regarding gender bias. Fourthly, before any other large conference is planned, the government should fund and organize a lengthy consultation process that will allow groups to research and formulate recommendations before coming to the conference. Lastly, there should be extensive consultation with grass roots organizations by the Department of Justice on the research regarding definition of families.

The final track was the taxation track. We chose to underline systematically the income tax system which, like many other laws in this country, discriminates against women. Particularly in the income tax system, as with other laws, that bias is compounded for women of different racial and ethnic origins: aboriginal women, senior women, lesbian women, and disabled women.

Our first and overriding recommendation was that a thorough study of the *Income Tax Act* be undertaken to identify the systemic biases that already exist and to also proactively come up with measures that would enable the groups -- these groups in particular and women in general -- to become substantially equal in this society.

Moreover, future tax policy should specifically address how new tax measures will affect these segments of society. In addition, the Finance Minister should genuinely consult with these groups that will be affected by all tax measures, not simply individual ones. Finally, proactive research must be funded in this area on a continuing basis, both inside and outside the Department of Finance.

We divided our recommendations into large categories and identified areas which require further research. Those categories were: the poor, including the outside (the home) working poor and the inside working poor; women in the outside workforce; the support of children; and women with compounded disadvantages. I will not list

all the areas within these subgroups, but again highlight one or two of the main recommendations. The primary purpose of doing so is to enable you to have some understanding of how the income tax system -- which is often neglected by feminists -- is, in fact, inherently discriminatory against women.

With respect to poverty, we echoed many of the recommendations made by the plenary speaker on the first day. In particular, there is a need to re-examine the tax rates and the thresholds at which taxes are imposed and tax credits are given. In particular, we need to look at re-indexation of the tax system and we need to eliminate the need for tax discounters that so many poor people are now forced to use.

More proactively with respect to the tax system, there should be more progressive taxation which might include inheritance and wealth taxes. Benefits should be targeted more directly and more substantially towards the poor in our society. Tax benefits should be given to those who need them, not, as in the case of RRSPs and other such benefits, to those who do not.

Support of children is a large area which needs thorough examination. In particular, one needs to look again at the amounts and who is given dependency amounts with respect to children. One also needs to look at child care expenses, and in particular, the group felt that it was important that child care expenses and tax credits be given equally to women who are employed and self-employed -- some of you know about the recent Symes case, obviously.

In addition, we need to look at the "equivalent to married" deduction to ensure that people, single parents, are aware that the equivalent to married deduction is there. In addition, same-sex couples need to be treated with the same privileges as other couples in the income tax system.

For those women with compounded disadvantages there are additional problems. We felt that there was a need to reinvestigate the amount of pension tax credits that are given to senior women, the property tax problem which means that many elderly women have to sell their homes, and the extent of medical expenses (deductions should be recalculated). In addition, there should be increased credits given to caregivers, both within and outside of the family. Also, funding for public pensions should be made available, possibly through the elimination of the RRSP deduction.

With respect to disabled women, it was felt that there should be a recognition of the true extra expenses that they incur both in the home and at work. Tax credits again should be given to provide real care which is given by the family or outside the family. In addition, extra tax credits should be given with respect to the increased costs that disabled women incur for education.

In regard to native women, we felt that the taxability of maintenance and alimony payments made from non-taxable reserve earnings should be eliminated.

The heterosexism of the *Income Tax Act* must be recognized and finally dealt with for the benefit of lesbian women. In particular, same-sex couples must be given the same family status as other couples within the *Income Tax Act*, although we would ideally like to see the concept of "family" completely reevaluated within the income tax system. In addition, same-sex couples should have available to them the privileges for tax credit and RRSPs that other people are allowed.

For immigrant women, there is a need to give readily understandable and available access to information in the tax system. In addition, there should be increased tax credits for the additional education process that immigrant women often have to undertake.

We felt that the *Income Tax Act* should be investigated to see to what extent, if at all, it is systemically biased against women of colour. There were no women of colour in our groups. We are not sure whether it is or not, and that may be our problem.

Finally and miscellaneously, there were a great many points made. We had 63 recommendations in total. Many of them involved easier access to information for researchers, which is now often very difficult to get from the Department of Finance. There have to be better forms and more information available with respect to the formulation of tax policy and to enable people to understand the tax system so that all people have a chance to participate in the process of developing that policy.

I have not done justice with respect to the hundreds of recommendations that took place in the substantive law sessions over the last couple of days. I think what we have realized -- and I hope that I have been able to at least capture to some extent -- is how invidious and how systemic the bias is with respect to gender and race. Hopefully, this conference will be a start of a process that will help fund important research into these areas and finally, start the process whereby we will eliminate these destructive biases in our system so that we may indeed, "walk what we talk."

Thank you.

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING CRIMINAL LAW (TRACK A.1)

BY RENATE M. MOHR, FACILITATOR

JUNE 10-12, 1991
VANCOUVER, B.C.

INTRODUCTION

It is a difficult task to report on a group process that involved over 30 participants, women and men from different parts of Canada, with diverse backgrounds, and each with her or his own reasons for having chosen to participate in the substantive criminal law track. The nature of the participants' expertise varied greatly. As might be expected at a symposium on Women, Law and the Administration of Justice, some participants knew a great deal about women and their status in Canadian society, others about the law and the administration of justice, and many understood or had experienced both. Although the racial and class backgrounds of participants were not homogeneous, we were predominantly white women and men who had full-time, white-collar jobs in the paid labour force. Since sexual orientation and physical ability are often not easily declared in such a large group in which an atmosphere of trust has not yet been nurtured, it can only be said that some participants often had to challenge the unstated assumptions that women are a heterosexual and physically able group.

When I undertook to facilitate a group, I must honestly say that I had envisioned a circle of about ten women who had come together to discuss their commitment to improving the condition of women in the context of the criminal justice system. When I learned more about the size and composition of the workshop, I was extremely anxious about my role as facilitator. As I hope to describe in this report, the ways in which this (apparently) unwieldy, large and intimidating group interacted and ultimately found ways to speak and listen to difficult and painful words made my experience of facilitating extremely rewarding. It is because I am so thankful to each participant in this group for what I learned that I am painfully aware of how much I owe them in reporting on the events that took place on June 10-12, 1991.

Facilitators have a great deal of power in setting the framework for the group discussion. Although I consciously attempted to divest myself of that power, I know there were ways in which my concerns influenced the process, and I thank all the participants for being patient and understanding on those occasions when they must have felt an impatience to get on with it. I now face the same concerns in my role as the recorder of history. Although I will attempt to report the proceedings of our group as objectively as I can, I remain aware that I can only record what I experienced, and what I experienced is influenced by who I am and how I am accorded privileges by virtue of my white skin, paid work, heterosexuality and able body . I feel sure that other members of my group will assist me in trying to be as inclusive and accurate as I can by providing me with comments on this report before it is sent out to a wider readership. I was given enormous support and encouragement throughout the conference by my rapporteur, Irit Weiser, but all errors and omissions in this report are my own.

In order to set the discussions and recommendations of the criminal law track in a context, I have organized this report into three main parts:

I. ORIENTATION AND THE PLENARIES
   1. Orientation for facilitators (Ottawa)
   2. Orientation for facilitators, rapporteurs and speakers (Vancouver)
   3. The opening plenary sessions (Vancouver)

II. THE CRIMINAL LAW TRACK (A.1)
   1. Summary
   2. The group process
   3. Recommendations

III. REFLECTIONS ON THE PROCESS

I. ORIENTATION AND THE PLENARIES

1. Orientation for facilitators (Ottawa)

This orientation meeting was held at the Department of Justice ten days before the beginning of the symposium in Vancouver. Although I had been a participant in one of the earlier consultation meetings, this orientation session provided an opportunity for all facilitators to be brought up to date on the planning of the conference and the proposed agenda. It also presented an opportunity for facilitators to meet each other and meet the rapporteurs who had been assigned to their track (workshop).

Although we were briefed on a number of agenda issues, I will only discuss those issues that related most directly to the workshop process. First we were informed that there would be participating and non-participating group members. In order to minimise government (bureaucratic and elected) input and to maximise input from non-governmental people, organisers had designated most politicians and bureaucrats as observers. (We did not, however, discuss the likelihood that some judges might see their role as one of observer status.) Secondly, we were told something of the criteria which generated the invitation list. An attempt was made by organisers to include a mixture of people with grassroots involvement and those with legal training. Participants would all have some expertise on the track topic, whether studied, written or lived. This led to a discussion of the importance of using inclusive and jargon-free language. Thirdly, it was made clear that the overwhelming message of the earlier consultations held to plan the symposium was that there must be a

recognition that women's reality is permeated by poverty, violence and discrimination. It was important to me that the symposium not be a forum for a debate as to whether in fact this was the condition of women's lives. The organisers stood behind their promise that it would be made clear to participants that the symposium was not to be a debate over whether in fact gender inequality existed in Canada. (It was clear that this would and did make my role as a facilitator easier than it might otherwise have been.) Fourthly, we discussed the meaning of the workshop headings: "Naming the issues"; "Articulating the goals"; "Overcoming the obstacles" and "Recommendations for change". The organisers' intent in assigning these headings to the workshops, as I understood it, was to give minimal direction and to allow each group to move at a pace that it felt comfortable with. As facilitators, we were asked if these headings were too constraining and if we had alternative suggestions. The organisers clearly did not want to steer the groups in any particular direction but were concerned that group discussions produce something more productive than a list of grievances. (Most participants, as it turned out, articulated their determination to generate recommendations.) Finally, we were assured by the organisers that the recommendations that the groups generated would be published and distributed, hence the need for this account of the "discussions and recommendations."

There were two other issues that I feel were important in setting the tone for what was to come: language and race. As a facilitator, I clearly represented both the dominant language group (English) and the privileged race (caucasian). This would and did have an impact on the participants' interactions. Although translation services allowed all participants to speak in either official language, the translation devices were almost exclusively donned by the vast majority of unilingual anglophones. This has a ghettoising effect and, even at the best of times, means discussions are interrupted for technical reasons. As well, the fact that not only the facilitator, but all but one participant in the group had white skin, placed an enormous burden on the one participant to constantly remind us of the race implications of our discussions. On day two, she invited another woman of colour to join our group, and in fact the dynamics in the group did change. Through discussions in the orientation meeting, we were at least able to voice concerns about the importance of raising issues of language and race with our groups at the outset.

2. Orientation for facilitators, moderators, rapporteurs and presenters (Vancouver)

On Sunday, June 9, 1991, the evening before the symposium was to begin, a general orientation session was held for all facilitators, moderators, rapporteurs and presenters. Since conference materials were not available to most participants in advance of the symposium and since only some of us had attended an earlier orientation meeting, the organisers spoke generally of the criteria for inclusion (who made the guest list and why) and the purpose of the two and a half days to follow.

True to their word, Susan Campbell and Susan Christie, the organizers, informed us that the premise upon which discussions would be built was that women are disadvantaged in the Canadian justice system. In the discussion that followed, we were advised that in generating recommendations, there was no need for consensus. (This would become a source of discussion in our group when it came time to pen the recommendations.) The organizers were hopeful that in the two sessions on Monday (day 1), each group would "name the issues" so that on Tuesday (day 2) each group would move to "articulating the goals" and finally, making "recommendations for change." By this time I had received a list of participants in my substantive criminal law track. It was clear from the list that it was to be a large group, more than 30 women and men, and the titles revealed that approximately one third of the participants were judges. Again I became extremely anxious wondering how such a large and disparate group could ever "name the issues" in two sessions (somehow they accomplished this) and how I could ever conduct a discussion with such a large and experientially disparate group. (The participants were remarkable in their ability to patiently wait their turn for air time, and to speak directly and honestly, with the pain that it often entails, when their turn came.)

3. The opening plenary sessions (Vancouver)

The opening plenary sessions, held on June 10, 1991, were the final events to set the tone and context for the workshops which began that same afternoon. Since these sessions will likely be discussed in more detail in the published conference proceedings, I will only highlight a few of the many thoughts that had an impact on the substantive issues dealt with in the workshops. In the session entitled "The Voices of Canadian Women," themes of poverty and racism were explored by three female speakers in a way that left a lasting impression on many listeners. (This again made my work as facilitator much easier since issues of poverty and race were made much more visible and visceral through the plenary speakers.) The Minister's address, entitled "A Vision for Canada's Justice System: Reflecting Women's Realities," also helped to set the tone for the workshops. In her speech, Kim Campbell mentioned that she was humbled by the more than 200 participants at the symposium. Implicitly, she acknowledged that "expertise" was not a quality exclusive to legal experts. (As a facilitator concerned about the silencing effect that so many legal experts in one group might have on the non-legal experts, I was hopeful that the Minister's words might help to empower those non-legal women to actively participate.) Following that theme, the Minister challenged the traditional view of the law as a lawyer's domain, spoke of the need to demystify the justice system and invited participants to break down barriers to create a justice system to incorporate the concerns of women today. With particular reference to criminal law, she mentioned that the adversarial system had not served women well and asked us to question how the criminal law treats female victims and offenders. She also supported the views of two Supreme Court

justices (both women) who had recently acknowledged the existence of gender bias in the construction and application of the law. Finally, she emphasised that this symposium was not an occasion to learn about gender inequality but that it was a working meeting built on the commitment of participants to work for change. (Although her words were welcome, if the discussions in our group revealed anything, it was that most of us still have a good deal to learn and that learning and education will be an essential part of any change).

II. THE CRIMINAL LAW TRACK (A.1)

1. Summary

The substantive criminal law group generated and tabled a number of recommendations. The framework for these recommendations was articulated as follows:

If one is to meaningfully address inequality and oppression through an examination of criminal law, there must be an explicit acknowledgement of the material reality of poverty and racism as well as disabilities and sexual orientation. Many important recommendations were made by the plenary speakers, particularly concerning racism and poverty, that must be addressed before any meaningful change can be made through the criminal justice system.

Not all recommendations made by the group accepted the current criminal justice system as a given. Some recommendations from the group were for overall structural change. This included a call for a separate aboriginal justice system to be established and run by aboriginal people.

Other recommendations were of a specific and short term nature, for example, the recommendation that preliminary inquiries be abolished provided that there is full disclosure by the Crown and police with sanctions for lack of disclosure.

Issues surrounding the accountability of all those involved in the justice system were discussed. Accountability of the Minister and the Department of Justice to follow through on the work that has been done over the course of the symposium was also seen as key. The group felt it was extremely important that there be a record of the proceedings so that all the participants could ensure their recommendations were fairly presented and most importantly that they have ownership of their words.

A final word about process, as substance can never be truly understood without it: one of the unwritten achievements of this group was that, in spite of all the limitations and differences, for two days, more than 30 people, including activists,

judges, academics and politicians to name a few, were able to sit together, speak together and listen to each other. That process has just started and we urge the Minister to remember that although this symposium represents an important step, it is but a first step that must be followed by others so that, as was so eloquently put by a First Nations woman in our group, "we may walk what we talk".

2. The Group Process

2.1 Day 1 - "Naming the Issues" (2:15-3:30 p.m., 3:45-5:00 p.m.)

The physical arrangements of the room in which our group first met were so formal and uncomfortable that it seemed even less likely that such a large gathering of people from diverse backgrounds could accomplish the goals that the organisers had articulated. (This was not the fault of the organisers who, I must add, acted at the earliest opportunity to remedy the problem). We all sat at one long banquet table, unable to see the sixteen or more people seated along the same side of the table. The microphones were shared. After a brief introduction, setting out some of the concerns about the process that I mentioned earlier, we each, in turn introduced ourselves. At the end of that "go around" it became clear that some judges felt that their role was to listen and to learn rather than to contribute to the discussion. The diversity of interests and experience also became clear after the first introductions. The second "go-around" actually resulted in a list of issues that people brought to the table. My notes listed the following issues as raised by the 32 participants who spoke in this part of the session:

"Naming the Issues":

- concern with accountability (e.g. structures of police accountability)
- women and children as victims (e.g. a better forum for expression)
- amend sexual assault legislation to include persons of trust or authority as aggravating features of the assault
- sexual assault evidentiary issues (particularly victim witnesses - see practices in Israel)
- there should be a Charter-driven review of defence practices in sexual assault cases
- there should be a review of aggravating and mitigating factors in sexual assault cases
- dangers of the state's role and a law and order agenda
- review the impact of Askov in light of child sexual assault cases
- concern regarding the treatment of young offenders
- issues surrounding a separate native justice process
- positive steps by trial judges to bring victims through the process

- funding issues: limited options for sentencing; victim surcharge but no support
- expert evidence and child abuse
- courtroom experience for children
- geographic and cultural differences: concerns with single solutions
- sentencing as a healing process
- community justice systems
- sentencing generally
- evaluation of Yellowhead program - family incest
- development of further programs to educate
- accountability for intervenors
- evidence (generally)
- sentencing (generally)
- consent and its definition in cases of sexual assault
- a review of Askov
- safety and security of women who report violence
- support for women who have survived incest
- clarify roles of police
- sentencing: treatment should not be used instead of intervention
- family violence and its impact on women and children
- the use of special family violence courts
- concern re preliminary hearing forcing the victim to go through the courtroom experience again
- review traditional evidentiary rules that are based on faulty (psychological) premises (e.g. judge and jury must treat children's evidence with care)
- re-examine process and procedure in family violence cases
- review child evidence rules
- concern regarding public expectations of judges (through media)
- inadequate programs available for sentencing sexual assaulters
- unfairness of law on the basis of race, gender and class
- rape crisis centre workers learn that women do not expect fair treatment
- accountability
- consent in sexual assault cases
- review of the treatment of women in Charter cases
- concern re the number of battered women who are forced to go in hiding
- rape victims harassed by police and courts
- role of "expert" witnesses
- treatment cannot be imposed - violence against women is a systemic problem
- must recognise specific issues in the North (e.g. many languages)
- concern re what will happen to rape shield
- sentencing
- policing
- violence against women (and their representation by counsel and counsel's exercise of discretion)

- differential impact of race and class
- violence of the criminal justice system
- review substantive law and explore alternatives
- if sentencing is a gauge of seriousness then harsh sentences are important
- access by women to all parts of the system
- change the basis for "consultations" with the Law Reform Commissions - how can we ensure recommendations will be followed up
- making language more accessible to laypersons
- access in the form of funding to do research, to respond to law reform commissions etc.
- rape shield - need new legislation if struck down
- repeal prostitution offence
- judicial education regarding the punishment of female victims
- accessibility of justice to women of disabilities
- effective use of the Charter to promote equality
- police accountability (e.g. need for an audit system)
- pornography
- prostitution
- consent
- reproduction
- freedom of expression
- responsibility of politicians to act on issues of violence against women
- prostitution (parallel to poverty)
- pornography as media violence
- victims of violence
- consent in sexual assault cases (eg. onus of proof)
- general impact of the Charter
- legislative recognition of racism and declaration that law should be emancipatory and liberatory for all
- in the Criminal Code there must be recognition of racism as a material reality
- racial discrimination is the reality of the lifescape of people of colour
- need to look at centrality of race and multiple vulnerability
- stiffer penalties for racially-motivated crimes
- minorities do not feel protected by Charter and human rights legislation
- issues of racism should be on public policy agenda (law faculties, bar associations etc.)
- question whether law is a "solemn inquiry into truth" (little "truth" if one person is dead and one has the right to remain silent) - thus re-evaluate adversary system, rules of evidence and role of Charter
- re-evaluate basis of the entire criminal law system by way of a national task force

This was the list as I transcribed it. There were many eloquent words spoken that I have neglected to reproduce here and if the economy of note-taking has resulted in any inaccuracies, I anticipate they will be corrected by participants. The list appears rather sterile when juxtaposed with my memory of the events. Some issues were very difficult for participants to name. I cannot transcribe their pain, but can only record my memory of it. Issues concerning racism were particularly painful for the one participant of colour in the group who carried that burden.

After "naming of the issues", we generated the following groupings of issues to be discussed on day two:

> Framework: The centrality of gender, race and class must be read into all of the issues listed below:
>
> 1. Accountability
> 2. Victims
> 3. Legislation
> 4. Sentencing
> 5. Young Offenders
> 6. Evidence
> 7. Regional Disparity
> 8. Structural
> 9. Education
> 10. Violence Against Women
> 11. Public Expectations
> 12. Access to Justice
> 13. Prostitution
> 14. Pornography

These headings were filled out with the substance of the earlier go-around and participants were asked to consider these issues for day two discussions. It was a long day, and many of us left the table feeling both hopeful and fearful (hopeful after a productive afternoon of naming the issues, fearful that we may never get further in our work due to the differences among the participants). I think I can safely say that each of us left the room exhausted.

2.2 Day 2 - "Articulating the Goals" (10:30 - 12:00 noon) "Overcoming the Obstacles" (2:00 - 3:30 p.m.) "Recommendations for Change" (3:45 - 5:00 p.m.)

With three sessions planned, day two was to be the most intense workday for the groups. The group sessions followed a plenary panel with three speakers. Each

speaker's message had some impact on setting the context for the second day of the conference, but perhaps most powerful for me as a facilitator, was the speech on "Multiculturalism and Justice" delivered by Mobina Jaffer, a woman of colour. The Minister of Justice had declared that the justice system is sexist and Ms. Jaffer urged her to declare that it is racist as well. Ms. Jaffer echoed the concerns expressed at the end of day one in our group - that "justice" should reflect the realities of all Canadians. To live in harmony, she said, both the black keys and the white keys of the piano must be played. Without the recognition of the importance of all keys, there could be no real music.

2.2.1 "Articulating the Goals (10:30 - 12:00 noon)

Just as the plenary session ended with the plea for an acknowledgement of racism, the group session began on that note as well. The one woman of colour in our group had invited another woman of colour to join in on our discussions on day two. I introduced the new participant to the group with a personal story of one of my first encounters with her. Some five years ago I attended another conference structured to deal primarily with gender inequality and the law. This participant happened to be a plenary panellist at this conference. She gave a powerful talk which left me, and other white women feeling angry and hurt. She had criticised us for being colour-blind in our work. I felt angry and hurt because I felt that I and other women at the conference had been working hard to further women's equality and felt that we needed support more than criticism. After several months, I realised that she was right. I had not taken enough notice of racism in my work. And thanks to her, I learned a great deal from that conference. I learned that defensiveness often gets in the way of learning and moving forward. I may even have warned participants that she would be tough and direct, but that they would learn from her words. And she was tough and direct, and I think many of us learned from her words.

At this first session on day two there was still a great deal of apprehension in the room. Some physical changes had been made so that at least we could all see one another around a square table. I cannot say that there was an atmosphere of trust, but I can say that there appeared to be a shared sense of wanting to accomplish the goals set for us by the organisers. In other words, participants made it clear that they wanted to produce some concrete recommendations by the end of the day.

As decided at the end of day two, we began by working our way through the list of 14 issues that were reported above. We started with accountability. The first participant to contribute made sure we did not lose track of the previous day's discussion about the centrality of racism and proposed that we adopt the following preface to our recommendations:

> "The recognition that woman or gender is always constructed through race, class, ethnicity, sexual orientation and ability".

This was to help ensure that in our discussions we did not fall back into the traditional assumptions that "gender" means white heterosexual woman. Again it was stressed that anti-racism was not just discursive but had serious practical implications.

The discussion then moved to "accessibility of language" and the suggestion that we must create a process that gives women more control over definitions and values. Another participant raised the need for a system of "tracking" cases as well as police activities. The discussion then moved to the need for federal and provincial governments to take greater initiatives to ensure that women would not always be left waiting for decisions of the Supreme Court of Canada. The wide discretionary power of judges, police etc. was named by another participant as the excuse used for non-accountability. The example was given of Crown attorneys who said they had no choice in the actions that followed the Askov decision.

It was at this point that the newest group member intervened. As a Mohawk woman, her message to us was that this criminal "justice" system we speak of was literally killing her people. Her people did not want access to justice. They had over-access. Her message was that she wanted nothing to do with the white man's criminal justice system. Her despair was that she had to spend her days at conferences saying "no" to our proposals to tinker with a system that kills, when we, the white participants, should be asking her people what a different "justice" system conceived by them would look like. It was she who left us with the powerful message that we must "walk what we talk". And the "walk" or the reality was that this criminal justice system was built on the backs of her people.

A new voice then suggested that accountability means change, and one structural change that should be considered is to have "policing" done by non-police and lay people. Another participant suggested the creation of an independent agency to audit and monitor police practices, particularly with respect to allegations of racism and sexual discrimination.

The issue of allocation of resources was then raised. It was suggested that higher priority should be given to the way that crimes are investigated and prosecuted (Crown attorneys should receive training), and, given the court overload, more judges should be appointed and provided with adequate facilities.

Another participant promoted regulation and observation of judges and politicians through a "telling on" system. It was felt that only through encouraging reasonable

men to "tell on" men who say and/or do sexist and racist things in their capacities as power brokers can we begin to crack the system.

The group was then told about the family violence court which has been set up in Manitoba. Among other things, this structure allows the chief judge to assign judges who have received training. As well, it allows Crowns who are sensitive to family violence issues to be involved. It is currently being "tracked" - Crowns must explain why they stayed charges etc. The other tracking project involves tracking cases from the time police get the call to go to a residence.

Some participants had voiced frustration with the perception of some judges that they must not participate because of their role as neutral, impartial, non-partisan decision-makers. One participant suggested that there should be a statement that "neutrality", "objectivity", and "impartiality" do not and cannot exist. This would, among other things, help to free judges to voice their concerns about the system.

The session ended with some strong words reminding group members that native peoples do not want this system, in any form. We were reminded that this system is about punishment whereas native people are more concerned with finding ways to restore the balance after damage has been done.

Since it was time for the noon break, it was evident that when we returned after lunch, we could not proceed on the issue-by-issue basis that we had started out on at the beginning of day two. There were only two sessions left and we had not yet generated a list of concrete recommendations.

2.2.2 Day 2: "Overcoming the Obstacles" (2:00 - 3:30 p.m.)

This session was aptly named by the organisers, for we did indeed have a number of obstacles to overcome, not the least of which was that there was little time left to generate recommendations. The nature of recommendations to be generated was also a problem, discussed on an earlier occasion by the group. Were the recommendations to be endorsed by the entire group? What about the judges who felt unable to endorse or make any recommendations? Could we table a long series of recommendations that had been distributed by a caucus of women's groups present at the conference? It soon became clear that the process would have to accommodate those who wished to make specific recommendations, those who wished to make broad structural recommendations, those who wished to make recommendations as individuals and those who wished to work in groups, etc.

This was one of the most difficult moments I experienced as facilitator, because although I had been instructed that it did not matter whether recommendations were

endorsed by the entire group, it clearly mattered to many of the participants. As is not surprising at a "turning point" in group dynamics, I have little recollection of how this dilemma was resolved, and can only report that, thanks to hard work on the part of the group, it was resolved. Participants were given approximately half an hour to generate recommendations, either in groups or individually. There had been enough exposure to each other's ideas that participants could and did find each other. One group dealt with very practical short-term recommendations. Other small groups or individuals were more concerned about developing structural changes. Most importantly, there was enough sense of trust in the group process that the participants used the remaining time to move the process along to the final session "recommendations for change."

2.2.3 Day 2: "Recommendations for Change" (3:30 - 5:00 p.m.)

The recommendations generated in day two were the result of a process that involved a large number of participants who were committed to making the conference a catalyst for effecting some real change in the criminal justice process. The recommendations that were submitted to me in writing were presented to the group. I will reproduce those recommendations below, but first I would like to describe the final events of the day. Although some provincial court judges had a meeting with the Minister for part of the afternoon, almost all other members of the group were in attendance throughout the two days of workshops. In deciding how to generate recommendations, there had been some difficult moments in the group, primarily about the privilege to remain silent that some group members felt they had to exercise. All participants present, however, participated in generating the recommendations.

By the final session of the day there was a feeling of some level of trust in the room. This allowed us to have one final go around the table to hear from each participant. As a facilitator, I found this session to be helpful in that it allowed us all to hear from each participant about their perceptions of the two-day process. Although there were some serious criticisms of the process and the organization of the conference, there was an overall sense on the part of participants, and shared by me, that the process had been an extremely rewarding and important experience.

One participant stressed the need for a public record of this event and thought it would have been important to tape the proceedings. She felt that there should be some recorded memory of the workshops and the conference as a whole (for example to be read into Hansard). Another participant spoke of the difficulties she faced in paying the cost of the meals and other costs associated with the conference. It was suggested that some way be found in the future to completely subsidise the attendance of women for whom this represents a difficult or impossible expense. She

also was concerned about not having received preparatory materials in advance. She too felt it was a mistake not to have formal minutes of the proceedings, so that this workshop and conference could be part of future consultations. Again, a participant voiced concern about the follow-up and that group members should be shown the record of proceedings before they are widely distributed.

There was disappointment expressed at Quebec's low-attendance at the conference. One participant lamented that so few anglophones were bilingual and suggested that it was time that we worked to catch up. More than one participant mentioned that it had been valuable to have judges in the group. For some women, it was their first opportunity to be heard by a judge outside a courtroom setting. Another disappointment that was raised was that native people were still waiting for the day where there is a space open on the agenda to get native issues on the table in meaningful way. As to the silence of some judges, this participant said that silence was a luxury she has never known. Many of the judges felt that the experience had been useful and that they had learned from the diversity of voices. Although some judges did not get involved in discussions, they were all there, listening.

As to the recommendations generated, participants felt that although they may not fully agree with each one, that they all agreed that these were issues that must be further explored. This was, as one participant stressed, the beginning of an important process, not the final step. Concern was expressed about the luncheon speech on judicial education and a suggestion was made that more careful attention must be paid to that education process. One participant suggested that a group from the conference should be appointed to ensure that the recommendations are put forward and heard. Finally, a reminder about a concern mentioned throughout the workshops, that if the rape shield provisions are struck down by the Supreme Court, that Parliament should be prepared to act quickly.

Recommendations:

The summary of the recommendations that was presented to the entire conference on the final morning of scheduled events was reproduced above. Here I will list the written recommendations that I received at the end of day two. Please recall that the approximately 40 recommendations that were circulated by a caucus of women's groups was also endorsed by many members of this group. The order in which the recommendations are listed does not reflect any priority ranking.

FRAMEWORK:

If one is to meaningfully address inequality and oppression through an examination of the criminal law, there must be an explicit acknowledgement of the material reality of poverty and racism as well as disabilities and sexual orientation. Many important

recommendations were made by the plenary speakers, particularly concerning racism and poverty, that must be addressed before any meaningful change can be made through the criminal justice system.

I BE IT RESOLVED THAT THE FEDERAL GOVERNMENT ESTABLISH A FRAMEWORK FOR ITS OWN EQUALITY RIGHTS LITIGATION. AT THE MOMENT GOVERNMENTS, WITH A FEW EXCEPTIONS, ARE AUTOMATICALLY DEFENDING ANY LAW OR POLICY WHICH IS CHALLENGED BY DISADVANTAGED GROUPS UNDER SECTION 15 OF THE CHARTER. THE RESULT IS THAT GOVERNMENTS ARE ON THE WRONG SIDE, FIGHTING AGAINST WOMEN'S EQUALITY INTERESTS IN MANY CASES, AND SPENDING MILLIONS OF DOLLARS DOING SO. THIS IS NOT ACCEPTABLE AND NOT CONSISTENT WITH COMMITMENT TO WOMEN'S EQUALITY.

II PREAMBLE

ANY FEMINIST ANALYSIS MUST BE INFORMED BY THE RECOGNITION THAT GENDER IDENTITY IS PREDETERMINED BY MANY FACTORS AND CANNOT BE DETERMINED EXCLUSIVE OF RACE, CULTURE, ETHNICITY, CLASS, SEXUAL ORIENTATION, ABILITY, AGE, LANGUAGE...;

RACISM AND RACIAL DISCRIMINATION EXIST AS PERVASIVE MATERIAL REALITIES IN OUR DAILY LIVES;

THE LEGAL PROCESS DENIES AND FAILS TO RECOGNISE THE EXISTENCE OF RACISM AS A MATERIAL REALITY;

THEREFORE WE RECOMMEND:

1. THAT THE CRIMINAL CODE BE AMENDED TO PROVIDE:
   - A) THAT ACTS OF RACISM BE DEEMED TO BE AGGRAVATING FACTORS IN THE COMMISSION OF ANY CRIME;
   - B) THAT THE COMMISSION OF A CRIMINAL ACT IN RESPONSE TO AN ACT OF RACISM BE MITIGATED BY THE EXPERIENCE OF THAT ACT OF RACISM;

2. THAT ANY GOVERNMENTAL INITIATIVES TAKEN IN THE AREA OF RACISM BE UNDERTAKEN ONLY AFTER MEANINGFUL PARTICIPATION OF THE AFFECTED COMMUNITIES.

III BE IT RESOLVED THAT THE DEPARTMENT OF JUSTICE SUPPORT A PROCESS, TO BE DESIGNED BY WOMEN'S EQUALITY-SEEKING ORGANIZATIONS, WHICH PROVIDES FULL ACCESS TO THE CREATION OF A JUSTICE SYSTEM THAT ENSURES JUSTICE AND FAIRNESS TO WOMEN, KEEPING IN MIND GENDER, RACE, CLASS, SEXUAL ORIENTATION, ABILITY AND AGE.

IV BE IT RESOLVED THAT A SEPARATE ABORIGINAL JUSTICE SYSTEM BE ESTABLISHED AND RUN BY ABORIGINAL PEOPLE. THIS MUST BE SEEN IN THE CONTEXT OF SELF-GOVERNMENT AND THE CONSTITUTIONAL PROCESS. THE JURISDICTION FOR SUCH A SEPARATE SYSTEM IS ALREADY RECOGNISED AND AFFIRMED UNDER SECTION 35. DIRECT ACTION TO IMPLEMENT AS DETERMINED BY ABORIGINAL PEOPLE MUST BE COMMENCED.

V THAT THE MINISTER OF JUSTICE INITIATE THE PROCESS OF AMENDING THE SECTIONS OF THE *CRIMINAL CODE* WITH RESPECT TO SEXUAL ASSAULT IMMEDIATELY; THAT THIS PROCESS BE UNDERTAKEN IN CO-OPERATION WITH SEXUAL ASSAULT CENTRES IN CANADA.

VI THAT THE FEDERAL GOVERNMENT ADOPT SPECIFIC SECTIONS TO MAKE SPOUSAL ABUSE AN OFFENCE, AND DISTINGUISH BETWEEN THIS TYPE OF OFFENCE AND ASSAULT.

VII THAT THE FEDERAL GOVERNMENT MAKE DISCRIMINATION BASED ON GROUNDS SUCH AS RACE, AGE, SEXUAL ORIENTATION AND DISABILITY AN OFFENCE.

VIII THAT THE FEDERAL GOVERNMENT RECOGNIZE THAT THE MOST IMPORTANT ISSUE FOR THE ABORIGINAL PEOPLE IS TO BE ABLE TO TAKE CHARGE OF THEIR OWN JUDICIAL SYSTEM AND OTHER APPROPRIATE INSTITUTIONS; THAT THE FEDERAL GOVERNMENT PARTICIPATE IN SETTING UP THESE INSTITUTIONS.

IX TO ESTABLISH ADVOCACY OR ASSISTANCE PROGRAMS TO ASSIST VICTIMS OF SEXUAL ASSAULT AND BATTERING THROUGH THE COURT PROCESS WITH SPECIAL SUPPORTS FOR WOMEN OF COLOUR, ABORIGINAL WOMEN AND WOMEN OF DISABILITIES.

X THAT FUNDING FOR WOMEN'S SHELTERS AND SEXUAL ASSAULT CENTRES AND OTHER COMMUNITY ADVOCACY GROUPS BE MADE AVAILABLE OR INCREASED. ONE SOURCE OF FUNDING COULD BE VICTIM'S SURCHARGE.

XI THE CRIMINAL CODE BE AMENDED TO ABOLISH PRELIMINARY HEARINGS PROVIDED THERE IS MANDATORY FULL DISCLOSURE BY THE CROWN AND POLICE WITH SANCTIONS FOR LACK OF DISCLOSURE.

XII PROVINCIAL JUSTICE MINISTERS PROCEED BY DIRECT INDICTMENT IN CASES OF VIOLENCE AGAINST THE PERSON UNTIL THE CRIMINAL CODE IS AMENDED.

* THIS RECOMMENDATION AND ALL RECOMMENDATIONS NOT BE TABLED WITH THE LAW REFORM COMMISSION.

XIII THE CRIMINAL CODE BE AMENDED TO INCREASE MAXIMUM SENTENCES FOR SEXUAL ASSAULT TO REFLECT THE SERIOUSNESS OF THE CRIME.

XIV HONEST BELIEF IN THE DEFENCE OF CONSENT BE AMENDED TO REQUIRE A REASONABLE BELIEF. CONCERN EXPRESSED THAT AN OBJECTIVE STANDARD BE DEVELOPED REGARDING THE DEFENCE OF CONSENT AND THAT IN PARTICULAR DRUNKENNESS SHOULD NOT BE TAKEN INTO ACCOUNT IN DETERMINING CONSENT AND THERE SHOULD BE SOME TYPE OF ONUS ON THE ACCUSED TO INQUIRE AS TO THE WOMAN'S CONSENT.

XV IF THE SUPREME COURT OF CANADA STRIKES DOWN THE RAPE SHIELD PROVISIONS IN THE CRIMINAL CODE, THE FEDERAL GOVERNMENT SHOULD BE PREPARED TO INTRODUCE NEW LEGISLATION IMMEDIATELY TO PROTECT WOMEN SURVIVORS OF SEXUAL ASSAULT FROM PAST SEXUAL HISTORY EXAMINATIONS AND THAT MAWL/NAWL'S RECOMMENDATION (P. 6-47) EXPANDING THE RAPE SHIELD LAWS BE ADOPTED.

RECOMMENDATIONS ON EVIDENTIARY RULES AND PUBLICITY BANS

Concerning victim sexual history examination restrictions, MAWL recommends:

1. *Maintain mandatory shield laws*, as they are the only way to prevent anti-victim bias and ensure a fair courtroom experience at the time the decision is made to report an assault.

2.* *Extend shield protection in s.276 to prevent examination of the victim's sexual history with the accused.* This will minimize anti-victim bias and encourage reporting in cases of "date rape".

3.* *Amend shield law s.276(1) so as to clarify that "sexual activity" of the victim does not include her sexual assault.* This can be done by uniformly using the term "sexual contact" when referring to the alleged sexual assault. Such an amendment should fairly confine injury rebuttal evidence to that which is necessary to identify the assailant, and prevent the assumption implied by subs.276(1)(c) that witnessing a sexual assault of the victim is grounds for assuming consent.

4.* *Amend shield law exception subs.276(1)(c) so as to only apply to similar fact sexual activity between the victim and the accused.* This is the only situation in which a bias-free, reasonable inference of consent can be made.

5. *Implement judicial education programs* which explore the proven link between sexual reputation evidence and bias against the victim, resulting in unfair acquittals of sexual offenders. Judges do not have the power to amend the *Criminal Code* but they do have the power and duty to interpret the law in a gender neutral manner, ensuring a fair trial for both the accused and the victim.

* See Appendix B, Recommended Amended *Criminal Code* Section 276(1).

MAWL recommends: that the Minister of Justice issue a directive to all Crown attorneys to request a publicity ban of the victim's name in sexual assault cases as soon as possible.

XVI THAT THERE BE MANDATORY TRAINING OF JUDGES, LAWYERS, CROWN ATTORNEYS ON GENDER EQUALITY ISSUES.

XVII AS AN INTERIM MEASURE, THE MINISTER OF JUSTICE IMMEDIATELY INTRODUCE AN AMENDMENT TO THE CRIMINAL CODE TO INCLUDE AS AGGRAVATED SEXUAL ASSAULT CASES WHERE THE ASSAULT IS COMMITTED BY A PERSON IN A POSITION OF TRUST OR AUTHORITY.

III. REFLECTIONS ON THE PROCESS

I will keep this concluding section brief, since this is to be a record of the group process, not of the facilitator's concerns. Throughout this account I have mentioned those features of the conference that impeded, rather than nourished, the process of generating recommendations. Having said that, I wish to stress one feature of the group process that bears repeating. The fact that judges, activists, academics, and women and men of different backgrounds sat together for two days and worked together to generate recommendations was, if not more important than the recommendations generated, an extremely important part of this first step. As a number of participants remarked at the end of day two, this is what education is all about. It is not about sitting passively in a rarefied classroom setting, being talked at or to. It is about hearing the stories and perspectives of women and men who affect and are affected by the criminal justice system. The need to include more women of colour was clearly felt in our group. Most participants commented on how they had learned a great deal from listening. I hope, as the Mohawk woman in our group hopes, that in the future, we can listen to those voices that are rarely heard at these conferences. We all hope that the Minister of Justice recognizes that the success of this conference lies not only in what it has generated in the way of recommendations, but in whether this first honest step can be followed by another ... and another ...

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING FAMILY LAW (TRACK A.2)

BY FREDA STEEL, FACILITATOR

JUNE 10-12, 1991
VANCOUVER, B.C.

1. EXECUTIVE SUMMARY

The members of the workshop felt that it was difficult to discuss such a vast topic in the short amount of time provided. A number of topics were suggested as issues for discussion. Time was not available to discuss all of these topics in depth and some were not discussed at all. In particular, there was concern that the issue of racism is an important factor in the area of family law and has a strong impact on aboriginal, visible minority and immigrant people; however, this was not a topic that was discussed at all in the workshop.

In addition, it should be clear that the recommendations in this summary are not listed in order of priority and include only those which were unopposed.

Generally, the participants of the workshop felt that the reality of women's lives was not understood or reflected in the drafting, interpretation and application of family law legislation. The various pieces of legislation affecting women such as the *Divorce Act*, the *Income Tax Act* and social service legislation must be seen as a coherent whole and must be used together to achieve stated goals. Too often, the pieces of legislation operate independently and in conflict with each other.

2.0 ECONOMIC ISSUES: PROPERTY, MAINTENANCE AND SUPPORT

2.1 GENERAL PROBLEMS

Equal division of property does not always result in equality and in some cases has actively harmed ordinary women. Most people do not have substantial assets and the property division rules do not take into account important realities of women's lives such as the fact that women generally retain custody of the children and make less money than men. This results in inequality.

- retirement pension allocation is inequitable after divorce because each individual keeps his or her own pension.

When a man has spent money in bad faith, the judge should decide whether it is fair to give a 50/50 split. Women often make a greater financial contribution to the family, yet the judge will still split the assets equally.

- new immigrant women are vulnerable because they are sponsored by their husband and he is responsible for them. Also, men buy property "in trust" for many relatives to protect their assets in case of marriage breakdown. This should be registered with a central trust office.

- it will be more difficult to maintain services to women with the cuts and the "capping" legislation.

2.2 DISCUSSION

In the 1970's, most provinces enacted statutes so that property would be divided between the spouses on marriage breakdown. Before, the spouse did not get the property, but got periodic maintenance or a lump sum which often included the house.

However, current legislation has not helped the majority of people unless they have a large amount of assets. Now, the wife only gets half the house and has the children. There is evidence that the man's standard of living goes up and the woman's goes down after divorce. The wife, because of her responsibilities, is left poorer and has to give back the husband's half of the house at a later date. This continues until the man remarries and a second family comes along. The husband is free to pursue his career and his income goes up.

The judge should consider a variety of factors in determining property settlement. Perhaps "grossly unjust and unconscionable" could reflect a situation in which a wife makes 60 percent of what her husband makes.

In upper class families, the greatest asset is the husband's future income. The way support provisions are structured in the *Divorce Act* is good. Lawyers often ask for too little. The changes to spousal maintenance failed to reflect the reality of women with children. They have fewer job opportunities and lower earning potential. We should reconsider self-sufficiency, which is not possible for all women. Long-term marriages may require greater spousal maintenance.

Women can only earn 60 percent of what men earn, yet spousal support is not given very often. After three judicial decisions, the idea is that on marriage breakdown, there is a parting of the ways and the parties are no longer tied to each other. However, where the woman was at home with young children or out of the workforce for many years, this does not reflect reality. The legislation may be adequate but its interpretation causes problems. Perhaps judicial education is needed. If we get into a formula approach to levels of support, it may pull levels down rather than up. We need more provisions for child subsidies and longer spousal support while women are being retrained. We should not be defining the notion of self-sufficiency.

Generally speaking, the non-custodial parent gets away with murder concerning support. The court needs evidence. If we have reliable evidence to determine the cost of raising children, it will be applied. In Moncton (New Brunswick), family law

lawyers have come up with itemized expenditures for each child and the court has adjudicated on that within the means available. Evidence is important, but in every case, a lawyer would have to generate a body of evidence. This is too expensive. The Ormorod decision gave a large spousal amount but the expert evidence cost a fortune. We need re-usable evidence. The cost of expert evidence is alarming. In Newfoundland, women who are seeking support orders do not qualify for legal aid unless there is a lawyer on the other side. We need an accessible way to get data before the court. We do not need experts to testify.

There is also a need for education of lawyers. A study was done of 200 cases in which there were separation agreements. In these cases, the support agreements were always lower than when the judges made the awards. There should be guides to minimum awards. In addition, many women do not go to court to request maintenance because they cannot afford legal assistance.

Child support is temporary in many cases, especially when the husband gets a new family and cannot meet both obligations. A policy decision must be made as to the priorities between first and second families. Often women are struggling to buy food and clothing with no compliance by the husband. Why should a man be allowed to start a second family when he is not caring for his first family? He has a moral obligation to support his children.

There needs to be a change, for example, in giving a wife a lump sum or a property settlement. Although it might be a preferable solution it could be very complex.

Members of the group felt that more data was necessary before decisions could be made. The creation of a continuing working group to study issues of property law and child support law was supported. A mild blend of research and policy is needed to find solutions. However, some felt that men's rights groups should not be members. The working group should be race, class and region sensitive.

CHILD SUPPORT

Child support should be studied. Minimum support and lump sum child support payments should be studied. We still need research on the cost of raising children. Food and clothing should be included but so should loss of opportunity and employment costs to the mother.

There is some research being done on the cost of raising children. Metro Toronto Social Planning Council says it costs $628 per month. The indirect cost of raising a child according to an Australian study was $40,000. The government has come out with a discussion paper on the legal aspects of the guidelines and in October they will release a paper on the cost of raising children. The federal-provincial-territorial

Family Law Committee is looking at child support guidelines. The Committee will be asking for guidelines. They will not be accepting economists' reports at face value.

There was concern in the workshop about bias in the process of defining the levels. We need to carefully evaluate research to ensure it is not gender biased.

Economist Joanne Fedick published a 1990 study which says that the cost of raising children is $100 per month. According to Agriculture Canada, it costs $60 per month to feed a child. The only data on family expenditure being used is a 1986 Statistics Canada study. Economists are comparing two-parent families with and without children. In two-parent families, 80 percent are homeowners, whereas in single-parent families, most are renters. The costs can be quite different. The U.S. economic model seems to be the standard: there is an assumption that families that spend the same percentage of income on food at home have the same standard of living. There is concern that economists are not evaluating whether $100 per month will pay the actual expenses.

PENSIONS

There was a study done of 200 cases in which there were separation agreements. The agreements did not touch on retirement pensions and we will therefore have a problem in 15 years. Even if the law says that pensions should be split, it is not being done in separation agreements.

Only five percent of Canada Pension Plans are split because people fail to apply. The pension is a fairly important asset and women will be relatively poorer in the future. Society will be paying for this in the future; we are subsidizing men.

In a few cases, pensions are given in exchange for something else, but in most cases they are not. Men are paying almost no support and are keeping the house.

In Manitoba, the pensions must be split and that cannot be changed by marriage agreement. Some women's groups say this is a paternalistic attitude and they should be free to contract as they wish.

In Quebec, we have our own pension plan and the woman must ask to receive her share. Many women do not know that they must make this request.

Many of the problems are created by poor legal advice. Often lawyers do not inform their clients of what they should know. It is ironic that the *Divorce Act* requires canvassing of mediation but not of pension credit splitting. Law societies should implement more education for lawyers to inform clients of their entitlement to

pensions. Women should be informed from the beginning that they are entitled to the pension.

Health and Welfare does not notify people of the possibility of pension splitting, but it should be done. Also, information could go from the Divorce Registry to Health and Welfare whenever a divorce occurs.

What about women in common-law relationships? Common-law relationships are recognized under the Canada Pension Plan but private pension plans do not always recognize the relationship.

On the death of the recipient of the pension, benefits cease. Survivor's benefits do not continue. The federal government should rectify the issue of survivor's benefits.

INCOME TAX SYSTEM

There are two areas we can look at for solutions: better social assistance programs, ones that focus on something besides unemployment; and tax considerations - for example, grandparents who supplement their single children and grandchildren should get a tax break.

When a man pays support, he gets a deduction and the woman must add it to her income. This is very unjust. Where the women get $200 to $300 per month for two or three children, they should not have to pay income tax on it.

In 1988, the average claimant paid $553 per month for an average of two children. There are three tax brackets now, so likely there will be no benefit if taxed in the wife's hands. If the wife had an income of $25,000 in 1990, she would have to pay 34 percent in taxes.

It should not be assumed that if men get the tax deduction, they will give the money to their wives.

It often happens that women start working part-time and at the end of the year, they find out they must pay tax. They often did not know that. This is unfair. Support payments are not "earned" income; they are for the maintenance of the children.

One member of the group felt that the income tax system did work well where both parties had good legal advice and took advantage of it. The problem arose when there was no legal advice.

There is a fundamental problem of ensuring that there is enough money for the needs of the parents and the children. If the parent who earns less money pays the

tax, there will not be any money left for the children. We should take the position that we should increase the payment as much as possible while taking into consideration the benefit accruing to the father. Many people have legal advice and can structure this. We must make more information available to those without legal advice or make the system simpler and more accessible. Larger deductions should be considered for children.

2.3 RECOMMENDATIONS

1. It was generally agreed that the present child support levels are too low.

2. It was recommended that longitudinal studies be done on the standard of living after divorce and the impact of divorce on standard of living.

3. Research and data should be collected and made available to the courts to give realistic assessments of the costs of raising a child and to avoid the need for costly expert reports.

4. It was further recommended that a group be set up to study issues relating to the reform of maintenance payments. The group would include members of NGO's and other experts.

5. It was recommended that division of pension credits under the CPP should be automatic. In terms of other pensions, it may be more difficult, but it should be emphasized that the pension is an asset of the marriage and part of a legal division of family assets.

6. It was also recommended that the federal-provincial-territorial working group should look at how survivor benefits of pensions could survive divorce.

3.0 CHILDREN; CUSTODY AND ACCESS

3.1 GENERAL PROBLEMS

- custody and access rights are often used as a bargaining chip to get concessions on property division
- friendly parent rule and mediation should be discussed
- changes are needed under the Child and Family Services Acts to allow parents more room for negotiation before the child is taken from the home.

3.2 DISCUSSION

There is a problem with making recommendations regarding children because there is a lack of information. We know a lot about economic issues, but not about children. Both children and parents have rights. We do not know what the phrase "the best interests of the child" means. It is a very different concept depending upon whether one is dealing with a dispute between the state and parents or a dispute between parents. We do not know enough about single-parent families.

Much of the discussion of children revolved around the issue of violence against women and children and its effect on custody and access. The issue of custody and access and violence in the family are intricately related. Abused women are told by judges and lawyers, "Yes, your husband beats you, but he is good to the children." Yet research has shown a correlation between wife assault and child assault. It has been empirically proven that children who witness a parent being beaten are adversely affected. Yet even some of our court-appointed social workers do not see a connection between wife battering and access to children. Both access and custody should be equally restricted if there has been violence. There is a sense of entitlement by white males to custody and access to children, no matter how violent they have been.

We must look at the assumption that it is always better for the child to have access to both parents. Is that necessarily the case when the father is physically and sexually abusive to the child? We know that violence against a spouse is relevant to a person's ability to parent. Violence against the child must be taken into account when we look at the child's best interests. Even when men are not violent, it should not be assumed that continued contact with the father is positive. The primary custodial parent should decide.

In cases of violent conduct by the non-custodial parent, access can be restricted and usually is by judges. Sections 16(9) and 17 of the *Divorce Act* are useful. It should be included as a rule that conjugal violence will result in restricted access to the violent parent.

The friendly parent rule presently contained in the *Divorce Act* has a chilling effect. It was reported that many women were advised by lawyers that due to the friendly parent rule, they should not raise suspected child abuse, in case they would be perceived as hostile. There are no guidelines in the *Divorce Act* for what are the best interests of the child, except for the friendly parent rule. Its presence in the *Divorce Act* tends to reinforce gender-based assumptions that women do not have credibility and women make false accusations. There is no empirical evidence to show this.

Many members of the group felt that the friendly parent factor was not helpful or useful and is damaging. Judges are able to recognize each party's merits. They do not need a rigid rule to apply mechanically. The deletion of the section does not prevent the judge from looking at the relationship between the parent and the child. The more you define best interest, the more you restrict the discretion of the judge. The particular facts of the case decide the outcome at the end of the day. There are many, many factors which will be considered to decide the best interest.

One member commented that in the Chinese community, violence is often alleged even if it is not true. Since the friendly parent rule is in the *Divorce Act*, the matter can often be settled out of court and we can convince the other party to give access, since it is the law of Canada.

The discussion of whether there should be guidelines or not also arose in the discussion of sexual orientation as a factor in the award of custody. Some members felt that it should be specifically stated in the legislation that the sexual orientation of either parent should not be a factor regarding access and custody. Other members were opposed to the specific inclusion in legislation on the same grounds they opposed an inclusion of guidelines in the custody legislation. Sexual orientation was simply one of the factors to be considered when deciding the best interests of the child.

On the other hand, a few members of the workshop felt that we should set up guidelines, similar to the definition of family assets, to help judges know what the friendly parent rule and best interests of the child are, and to state that where one parent has been violent, we would restrict access.

Some members felt that sometimes women do make false accusations, due to fear that the husband will snatch children and due to unreasonable fears. Often mediation can resolve this.

3.3 RECOMMENDATIONS

7. It was recommended that there be a statutory inclusion in the *Divorce Act* and in relevant provincial legislation that violence by one spouse against the other should be relevant in custody cases. Evidence regarding the effect of living in a violent family (extrinsic evidence) should be admissible at the motion stage of the hearing, without having to call in expert witnesses.

8. It was recommended that more research is needed into what constitutes the best interests of the children.

9. It was also recommended by a majority of people in the group that the friendly parent rule should be abolished, although one member of the group felt it served a purpose.

10. There was a consensus of opinion that there is a need for funding of supervised access facilities with trained staff and safe transfer facilities open during office and non-office hours.

11. Five delegates proposed that sexual orientation of either parent should not be a factor regarding access and custody and this should be stated in the legislation. These delegates also proposed that same-sex couples should be included in family legislation.

4.0 VIOLENCE IN THE FAMILY - WOMEN AND CHILDREN, MEDIATION, TREATMENT, POLICE RESPONSE TO COMPLAINTS;

4.1 GENERAL PROBLEMS

- the justice system fails to understand violence, its relation to custody and access issues, and the importance of protection of women.
- transition house workers are being called into court to give evidence on violence. The women are sent subpoenas because they would not willingly testify. Unless women can defend themselves, they should not be punished for refusing to testify.
- transition homes are needed in the North. Men should leave the family home and go to another place.
- better police protection is needed to enable women to stay in their homes.
- victim impact statements should be used in cases of battered wives and women. The women need more support through the court process and afterward.
- treatment of batterers is often supportive of their behaviour.
- response of police to family law issues. They do not press charges against men, suggesting it is a private matter; women have to make a private complaint. Women with low education and low income cannot defend themselves.
- regarding violent crimes: how can we make men pay for their crimes? They should be sent to treatment programs and fined, not jailed. The fines should pay for transition houses, etc.

- there is violence against "labelled" and vulnerable people on the rise in the community; for example, youth gangs swarming the elderly. Single parents are under a lot of stress and cannot discipline their children according to societal norms. There is a lack of support systems for parents. People are losing their children because they are not financially able to care for them.

4.2 DISCUSSION

The overwhelming feeling of the workshop was that the court process does not address violence in women's lives. People in general do not know what battered women are going through. The reality is that the husband says, "I will kill you if you get a restraining order" and society does not help her. Women have low self-esteem and feel guilty. Therefore, they excuse men who batter them. Education is a key and it must start early.

There is a special problem with violence and aboriginal people. Some think that the justice system does not apply to them because they are on the reserve. One study indicated that 12 percent of aboriginal women went to shelters because they had nowhere else to go, whereas 3 percent of women go to shelters. The rest stay in the home with restraining orders, despite the fact that police protection is inadequate.

There is a lot of ignorance about restraining orders and despite the option, many people do not ask for it.

Many judges will make a mutual restraining order, even if it is not specifically requested. The burden of proof for ex parte motions is very heavy.

Some of the judges expressed the opinion that exclusive occupation of family home is given to the woman in all cases on motion.

Most provinces do have a provision allowing the woman to stay as sole occupant of the home but she will go to a transition house for protection. In this case, if the children have not been battered, the woman may lose custody and her home. The link has not clearly been made between wife assault and appropriate parenting. A quicker response system is needed by the police.

Common-law spouses who are victims of violence cannot ask for sole occupation of the home. This may be s.15 Charter discrimination. However, common-law spouses can get a restraining order under the common law. Restraining orders are a matter of urgency, and can be given ex parte. If there is any evidence of danger, the court will act to protect the children.

Instead of penalizing the batterer, we give him a choice of therapy or a sentence. Batterers may choose therapy because they simply do not want a sentence. This reinforces the patriarchal system. Therapy should not remove the sentence. The sentence is linked to the crime. Therapy should be additional. The fact that the man has undergone therapy usually is a major factor in allowing him to return home, but this is deceptive since therapy is often not effective.

SHELTER HOUSES

The shelter is a front-line resource for battered women and we need a commitment for more funding; $136 million is being given to fund Phase II of the family violence initiative by the federal government. Often the police get funding for victim's services and not the shelter itself. Shelters are the main providers of services and should get the funding. Part of any fine should be directed to shelters which give emotional and legal direction to women. Services must be accessible to disabled and special needs women, too.

DISPUTE RESOLUTION AND MEDIATION

In white society, the systems keep segmenting life's activities. We have to get to the grassroots and the roles and responsibilities of the individuals and try a holistic approach. We should not try to fix up systems that do not work. We must change them. The two principles by which our people live are responsibility for self and responsibility for society. Not everyone goes to divorce court and most native people are married common law and never go to court. Our systems prior to contact were workable for us. We need to look at our roots, see who we are and how we got where we are today. Aboriginal peoples are doing that now. The individual must take care of his own responsibilities and aboriginal peoples must look at their own society and take back their own rules and responsibilities. The tribal justice system in the Yukon is looking at dispute resolution which involves the whole clan. The old values and systems should be returned to as much as possible.

In several provinces there is *de facto* mandatory mediation. The whole concept of mediation as a method of dispute resolution is based on relative equality of bargaining power. Mandated mediation is contrary to community-based dispute resolution. Given women's inequality in society, many women are in a situation of power imbalance. There is no power balance where violence is involved. Inequality of bargaining power also exists because of unequal financial status. Mandated mediation is often an inappropriate prerequisite to obtaining legal aid, as it is in Ontario. It should not be a legislated preference in the *Divorce Act*. Mediators must be regulated.

Several members of the group felt strongly that the problem at present is not simply mandatory mediation but non-mandatory mediation as well. Particularly in cases of violence, any type of mediation may be inappropriate. Women's concerns are not only about mandatory mediation. There was not time to explore this issue in greater depth and due to the lack of time, the group's recommendation was limited to mandatory mediation.

4.3 RECOMMENDATIONS

12. It was recommended that there should be research into the development of tribal dispute resolution mechanisms and tribal courts for family law disputes.

13. It was recommended that there should be no mandatory mediation.

5.0 CULTURAL DIFFERENCES - FAMILY

5.1 GENERAL PROBLEMS

- Some abuse may be due to cultural differences. Therefore, a package of information should be developed for immigrants and ethnic communities regarding expectations in Canadian culture on child discipline, etc. One example is loitering, which is allowed in some countries, but not in Canada. The immigrant family would report to a Welcome House and receive the information.

5.2 RECOMMENDATIONS

14. It was recommended that a briefing package for immigrants be designed to provide orientation materials to new immigrants. The family would be directed to a Welcome House by means of a directive upon arrival to report to a given address within two to three weeks. The package would include information on discipline of children, wife battering and local by-laws. Also included would be information on the rights of citizens (especially women) in Canada, information on the rights of women sponsored as immigrants, and information on pension splitting and family law.

6.0 SYSTEMIC PROBLEMS; GENDER BIAS, DE-JUDICIALIZATION, RACISM

6.1 GENERAL PROBLEMS

- racism and the law must be discussed
- discrimination related to gender and psychiatric labels is an issue
- psychiatric assessments should be done by feminists, not by male-dominated psychiatrists
- men are using de-judicialization (mediation and worker intervention) to abdicate responsibility for their actions. Mediation sometimes turns custody and support issues into access issues.
- the government should develop a policy regarding whether or not to defend women's rights cases.

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING TAX LAW (TRACK A.3)

BY MAUREEN MALONEY, FACILITATOR

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INTRODUCTION

The tax sessions canvassed a wide variety of areas in the taxation system. It is impossible in a short report to encompass all the views and ideas that were expressed, particularly in the same flavour and manner in which they were addressed. I have organized the group's discussion around organizing themes. These were not group themes but rather emerged as themes as I looked over the notes and discussions. Accordingly, I have taken some liberties that I hope will not take away the flavour and main points of the intense discussions which we had over the symposium period.

GENERAL

The group recognized that the taxation system was both systematically and systemically biased towards women in its operation. In addition, we found that the bias was compounded for women of different racial and ethnic origins, senior women, lesbian women and physically and mentally disabled women.

Accordingly, our first and overriding recommendation was that a further study of the income tax system in Canada be undertaken to identify the systemic biases that currently exist against women and particularly those women who are already disadvantaged. In addition, this study should encompass proactive measures which would enable groups, particularly of disadvantaged women, to become substantively equal in this society. Moreover, and very importantly, the group unanimously agreed that all future tax policy formulations should specifically address how new tax measures would affect these segments of society. The Finance Minister should consult genuinely with these groups and research should be funded in this area on a continuing basis, both inside and outside the Department of Finance, to pinpoint existing inequities and to specify how the tax system could be used to enhance substantive equality rather than diminish it, as it currently does.

The remainder of the recommendations will be grouped into large headings. Many of these headings are, of course, interrelated and occasionally recommendations and suggestions have been made twice. The headings are:

Poverty
Family
Children
Women in the outside and inside work force
Compounded disadvantages
Miscellaneous

POVERTY

No law can be adequately assessed without factoring in its impact on the poor in society. One recent figure suggests that more than one million children in Canada live below the poverty line. The situation is urgent. Moreover, women are disproportionately represented among the poor. More than 60 percent of people who live below the poverty line in Canada are women. Accordingly, poverty is very much a woman's issue, as indeed it should be everyone's issue.

The income tax system contributes to the poverty level at which women live, both directly by taxing poor women and indirectly by favouring wealthy people over poor people.

Some specific examples (and commensurate recommendations) include:

a) The movement towards the de-indexation of both tax rates and credits increases the tax margins for everybody. However, those women at poverty levels in the workforce are disproportionately affected as they are in the greatest need of money.

b) The abolition of the employment expense deduction and the standard medical deduction again tends to hit women harder as they are most in need of these smaller deductions and incur greater expenses when moving into the workforce, particularly after having worked in the home for a few years or more.

c) The *Income Tax Act* chooses very different thresholds than Statistics Canada for the poverty threshold which would (and should) exclude far more poor people from the requirement to pay tax.

d) Tax discounters should be outlawed and in their stead there should be alternatives for earliest receipts of refunds in the full amount.

e) The income tax system should categorize poverty more carefully and include realistic assessments of the financial obligations of family responsibilities, child care and the real costs to women entering the outside workforce.

In addition, the *Income Tax Act* is biased against the poor in that most of its welfare measures are geared towards the wealthy in society. Accordingly, the largest tax credits and deductions that are available, such as alimony and maintenance deductions, registered retirement savings plans, retirement funds, education savings plans, capital gains exemptions, are only available to the wealthy in society. Although

the statistics are not available as to which gender is most likely to use any of these tax expenditures, there is little doubt that these measures are overwhelmingly utilized by men. Accordingly, the system is very biased in favour of its handouts towards wealthy males. Again, the tax system should be more broadly based to allow for a more progressive taxation system that may include inheritance and wealth taxes and increased tax bands to allow for a better shifting of the tax burden onto the more wealthy in society.

Tax credits should also be made refundable in all cases, not simply in the case of GST and child dependency. The people who usually need these credits the most are the very people who may not have tax payable. Benefits should be given to those who need them, not as in the case of RRSPs and other such benefits, to those who do not.

In addition, the tax group recommends that when source deductions are taken from outside working women's pay cheques, child care expenses, etc. should be factored into the calculations. Women should not have to wait until the end of the year to get back these expenses.

In addition, the concept of a negative income tax system should be investigated for possible introduction to help ease the burden of the movement from welfare to an outside working job when the salary one can obtain is low, which is the usual case for most women. The success in Manitoba of the negative income tax is a model that could be refined and revitalized.

FAMILY

The income tax system should not privilege one type of family unit as it currently does with respect to a married husband and wife with children. Such a depiction both reinforces the role of women in society and discriminates against others who do not fit within this particular societal form. In particular, there should be full recognition of lesbian and gay couples and families.

The difficulties and financial hardships which usually accompany single parenting should be even more broadly recognized within the tax system. Moreover, this must be carefully thought out, for even well-meaning subsidies can have unfortunate consequences. For example, single parents are allowed to deduct a married equivalent deduction and this is one important recognition of single-parent status. However, it is not without its downside. The existence of this credit means that single parents may be better off not to remarry. The income tax system should be neutral as to whether or not one chooses to marry. There should be neither incentives nor disincentives for the type of relationship one enters.

Finally, the definition of spouse should be extended to allow pension credit transfers to common-law and same-sex partners.

ALIMONY AND MAINTENANCE PAYMENTS

There are a great many difficulties with the tax treatment of alimony and maintenance payments. The group recommended that alimony and maintenance payments should not be included in the recipient's income nor deductible to the payer of the payments. At the very least, the group found it preposterous that the payer (usually the ex-husband) would be able to deduct the cost of child support payments and that it would be included in the mother's income. Most studies show that the mother who has custody of the child pays a great deal more towards the child support than does the ex-husband. However, for income tax purposes, the mother must include the small portion her ex-husband does pay in her income for tax purposes and has no deduction for her own costs.

In addition, there are problems in the year of separation when the ex-husband's income must be taken into account when calculating the single parent's tax credits. This should be clarified and amended.

Again, as previously mentioned, if the ex-spouse chooses to live with someone else, she is better off not marrying that person if she is able to claim the single parent deduction. This provision and others like it (the spousal tax credit, etc.) points strongly towards the government looking anew at its policy of individual taxation overlaid with family unit taxation. Individual taxation should be the only criteria and only in exceptional circumstances should the family unit be taken into account when, for example, attempting to eliminate poverty. This area requires a great deal of further investigation.

CHILDREN

Some of the taxation issues associated with children, particularly on the breakdown of a marriage, have been dealt with above. However, there are separate and distinct difficulties with the way in which the income tax system treats children. One further item that was not mentioned above is that child support payments should have priority over income tax debts. Currently they do not.

There are two types of child support in the income tax system: child dependency and child care support. Dependency expenses are allowed as refundable child tax credits. It is important that these tax credits be refundable to ensure that the people who need them the most will receive them. Although the group decided that universal tax credits were still advisable and necessary, there was some concern that people who need them most should be allowed the most expenses. Accordingly, people with

more children and less income should be given more by the taxation system than those people with higher incomes who do not need the money as much.

The issue is even more important with respect to child care expenses. Women who need to have a subsidy for child care expenses most are those who obtain the least. Child care expenses are not fully deductible and only an inadequate amount of money can be claimed. In particular, it is important that at the very least all women are treated the same. If the *Symes* case should be overruled by the Supreme Court of Canada, then the income tax system should be adjusted to ensure that all women are treated equally in respect to deductions of child care costs regardless of whether they are employees or self-employed. Furthermore, child care costs should be treated as refundable tax credits and not deductions which favour higher-paid taxpayers the most.

The tax group also believed quite strongly that the *Income Tax Act* should reflect more realistically the true cost of child care. However, it may well be that other ways of delivering subsidies to the child care system, i.e. through state-subsidized or state-run day care centres may be a better way of doing this. Again, investigation and research is required.

In conclusion, it was felt that all the tax credits should be refundable and should be universal. However, they should be diminishing so that the people most in need of them would be the people who receive the greatest proportion of them. In addition, for the purposes of testing thresholds in the *Income Tax Act*, the full cost of child care expenses should be recognized.

PROVISIONS FOR WOMEN WORKING BOTH INSIDE AND OUTSIDE THE HOME

Women who work inside the home:

Again, the *Income Tax Act* discriminates against women in the way it treats the work of women. Some measures and incentives are needed for women who work inside the home as well as women who work outside the home.

The *Income Tax Act* and system takes no account of the valuable work performed by women within the home. There are many ways that this could be validated in the income tax system. One way would be to impute a dollar amount tax credit to recognize the important work done by women in the home. However, this would have to be factored in with other measures to enable the inputed income to be both taxed and paid for by society. Again, this is an area which requires a great deal more thought and research.

Women who work in the home and could only work for low wages outside of the home (which is the case for the vast majority of women in this country) have an added disadvantage. Because of the way in which the spousal tax credit works, the spouse that works outside the home, usually the husband, would be unable to get this credit if the secondary worker, usually the woman, enters the outside workforce. Accordingly, this extra cost must be factored into the decision to work outside the home. This may be prohibitive for someone who can earn only a small amount of money and must in addition bear the heavy costs of child care expenses. This entire area, again, is one that should be looked at more carefully and dealt with as soon as possible.

There must be recognition of pension benefits for women who have worked in the home and their rights to contribute to RRSPs by deductions from investments or other unearned income, if they so choose. In addition, many women who work inside the home also work outside the home in a volunteer capacity. Many of these women incur considerable expenses which cannot be claimed. If this volunteer work is indeed valuable, then these expenses should be allowed to be claimed.

Women who work outside the home:

Again, this is an issue that needs to be studied very carefully. In particular, great care must be taken to see that there are no disincentives for women who decide to work outside the home. To ensure that this does not happen, the entire income tax system will have to be taken into account, including the way in which tax credits for spousal "dependents" (so-called) are given, the inadequate amount of child care costs which are allowed to be taken into account and the added costs of re-entering the workforce after some time.

In addition, training costs should be allowed more flexibility as deductions or preferably credits. In particular, interest on student loans should be deductible, scholarships should not be taxable and the goods and services tax on books should be removed.

To the extent that child care costs are raised, or better provision made for day care, it may also mean that day care workers both in centres and in individual homes would be better paid. This will help remove some of the class and racial bias that exists with respect to day care workers in this country.

Again, tax rates should be lowered for those workers near the poverty level and compensated for by an increase in tax rates for those nearer the top of the income scales. Employee deductions should be brought back at an increased amount in the first year of entry or re-entry into the workforce when expenses are incurred.

COMPOUNDED DISADVANTAGES

This category is meant to encompass women who are particularly disadvantaged. In addition to their gender, other women have disadvantages which are often exacerbated by the income tax system. The group looked at women of colour, women with physical and mental disabilities, senior women and lesbian women.

Senior Women:

The group pinpointed problems with the tax treatment of pensions. Again, it was noted that the flexibility for RRSPs works in favour of wealthy males rather than poor women. Accordingly, if retirement was to be funded through state-subsidized tax expenditures, then these should be geared more clearly and more specifically towards the people who would probably need most help in retirement - women. The statistics on older women who live in poverty are quite appalling and this would be one way of helping to alleviate the problem.

In addition, the definition of "spouse" should be expanded to allow pension credit transfers between senior spouses.

There should be a provision for pensions for single women or widows and for survivor benefits from pensions.

Lesbian Women:

As mentioned above, because of the way the income taxation system rewards heterosexual couples who marry, this discriminates against lesbians and gay couples. All provisions that have this effect should be eliminated or modified to include lesbian couples within their base.

Mentally and Physically Disabled:

Again, there should be better training facilities for these people. There could be corporate incentives, such as accelerated capital cost allowances to encourage employment and better facilities.

There should be greater allowance for the medical and associated costs which are often considerable for disabled peoples.

In addition, tax credits should be given in recognition of the caregiving performed by family members. They should be increased considerably to recognize the amount of work that caregivers, most of whom are women, give to disabled people.

Immigrant Women:

The language difficulties for immigrant women should be recognized in the way in which forms and information regarding the tax laws are given. In addition, attention should be given to English language courses for immigrant women. This is an area that deserves more research.

The group recommends that all barriers to the outside workforce should be addressed by the income tax system. This may include giving accelerated capital cost allowances for modifications or equipment bought to facilitate the entry of disabled people into the workforce. There should be caregiver expenses for people who perform this important work. In addition, the income tax system should be looked at to help other affirmative action programs which the federal or provincial governments are undertaking.

MISCELLANEOUS

As will be seen from the above, the tax group found a great deal of gender and class bias within the income tax system. It became clearer and clearer as the group went through its investigations and discussions that a great deal more research needs to be done into every one of the issues that have been raised. The Department of Finance and other departments should be funding this in full, both initially and on a continuous basis. Researchers in the group expressed frustration with obtaining information regarding the taxation system and those who use it. The group recommended that information should be complete and made available as soon as possible after requested or compiled by the government.

It is hoped that by having a more systematic review of the income tax system on a continuous basis of the way in which the tax system affects women, the system will become more fully integrated with the needs of women. Not only should the provisions which discriminate against women be eliminated, but others should be introduced that would ensure substantive equality in this society. The provisions should be an integral part of any taxation system and not simply add-ons.

Moreover, the tax group felt very strongly that the incomprehensibility of the *Income Tax Act* was one of the major stumbling blocks to input by women's groups and others. It is important that information be made available as soon as possible and in an understandable fashion and that women's groups be consulted in the same way that other groups are, primarily business groups, during budget preparation and consultations.

It is also important that information be made available to women to ensure that they are aware of their rights under the *Income Tax Act* and that they be made fully aware of any incentives or initiatives that might help them in reducing their tax burden. The forms, guidelines, bulletins and circulars that are put out by Revenue Canada are not generally known to ordinary people and are not very well explained.

There was also a real appreciation among the group that the Department of Finance should be involved in many issues of interest to women. For example, a representative from the Department of Finance should be working within the family law group and other groups that are working on women's issues. This would make for greater coordination and, hopefully, gender equality.

All in all, the major recommendation of this group is that the income tax system cannot and should not be ignored by the government in regard to its impact on women. The income tax system has been and continues to be discriminatory against women, both overtly and covertly. This must be remedied immediately by having in-depth research done in a variety of areas of the income tax system. However, even more than other laws, the income tax system is not a static one and continually evolves with changing societal behaviour. Accordingly, it is very important that women are involved in the primary stages in tax policy decision-making. Until this is done, women will only be add-ons and will continue to be discriminated against.

Hopefully, this symposium and these recommendations will contribute to the debate.

II

GENDER AND THE LEGAL PROCESS

- Access (Track B.1)

- Court Process (Track B.2)

- Sentencing (Track B.3)

TRANSCRIPT - AS DELIVERED

SUMMARY OF "GENDER AND THE LEGAL PROCESS"

presented by
- STEPHEN OWEN -
OMBUDSMAN OF BRITISH COLUMBIA

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

JUNE 12, 1991
VANCOUVER, B.C.

I would like to apologize in advance for any misstatement of the recommendations, principles or issues from the three workshops that I was involved in and will be reporting on. I am very pleased that there will be an opportunity for people from the floor to correct, add to or amend anything that I may say on their behalf. Also, I understand that there will be, through the Department of Justice, reports of proceedings sent to workshop members for amendment and comment, and then to participants; and these will contain the very detailed recommendations as well as discussions of our workshops.

In the legal process track, it is understandable that there would be significant overlap in the issues considered; what was perhaps less predictable was the extent of consensus in the principles and recommendations that have come out of those workshops.

There is very significant, if not unanimous, agreement on the things that need to be done and addressed across those workshops; and after hearing Dean Maloney, clearly many of those principles are reflected in the substantive law workshops as well. They cover issues of accountability for the ongoing process of change, the imperative of dealing with violence against women, the need for education throughout our system of justice, adequate funding for the support resources that are needed, and especially the need to address all issues of discrimination against women comprehensively and at the same time. That was very strongly stressed in the three workshops in our track.

With respect to access, first of all, the access group reached consensus on the following principles and priorities. Specific recommendations should be interpreted in light of these. There were 53 specific recommendations that will not be reported in detail here but will be part of the proceedings. These principles and priorities also provide criteria for assessing the success of the implementation of the recommendations.

First of all, women's concern is access to justice, not merely access to the justice system. Women's concern is also access to justice for all women. This means that the fundamental problem cannot be corrected by addressing only sex discrimination. Race discrimination and discrimination because of disability, poverty and sexual orientation must also be addressed and at the same time.

The poverty of women is a priority and must be addressed if women are to enjoy justice. The justice system criminalizes women who are poor, yet access to justice is also barred. Women experience both too much and too little access to justice.

Aboriginal women also experience too much access to justice. First Nations women are criminalized in disproportionate numbers because of sex, race and poverty. On

the other hand, the justice system does not protect or defend them. The white justice system oppresses First Nations women.

Violence against women must be addressed as a priority in all forums, by all decision-makers and actors in the justice system. Policies of zero tolerance should be implemented.

For women, the justice system is in crisis. As a priority, a major campaign should be undertaken over the next two years by federal and provincial governments acting both independently and cooperatively to ensure access to justice for women. Mechanisms should be designed to make the process of implementation accountable to women and to ensure that women are consulted throughout the process. Mandatory training and education programs on issues of equality of all women are required for decision-makers and actors at all levels of the justice system. As a priority, women in all their diversity - including First Nations women, women of colour, women with disabilities and lesbians - must be appointed to all bodies involved in the administration of justice.

Funding must be provided to make access to justice for women a reality. This means, among other things, that funding to women's organizations should be restored to ensure that women can participate in the transformation of the justice system into a just system for women.

With respect to the court process workshop, many of these same issues were addressed, and I think recommendations that will be forthcoming in the full proceedings will be very similar.

Given the diversity of the backgrounds of the people involved in these workshops and the similarity in the conclusions and recommendations that are coming out of them, I think we can take them as having great weight. The Department of Justice, the Minister of Justice and the Government of Canada should give significance to the weight of these near consensus recommendations and principles that are enunciated.

The court process workshop dealt with a number of major issues. I suppose the one that received the most attention was the emphasis on victim services and victim rights related to violence against women. It was suggested strongly that counsellors be available to assist victims of violent crime throughout the court process, and preferably counsellors from agencies that are not directly involved in the court process, so that there is some independence to that advice and counsel.

It was recommended that there be enhanced police and prosecutor sensitivity to victims: to their fears, to their rights and their uncertainties with the justice system. The Department of Justice was urged to promote and fund family violence courts

similar to the model operating in Winnipeg with a victim-centred approach. Mandatory victim impact statements were suggested, and this also came forward in the sentencing workshop.

A major concern with victims' rights is the protection of victims of sexual abuse and assault in the court process. Suggestions were made for the greater use of screens or close circuit technology during the presentation of evidence so that the confrontational nature of the giving of evidence could be reduced.

There was also a duty of prosecutors mentioned that should be reinforced across the system: to bring to the attention of judges concerns raised by victims or witnesses so that special arrangements can be agreed to through the court process. One of the judges in the workshop commented on the potential for flexibility in that system where these concerns are properly raised. This was seen as a very positive duty that should be stressed to all prosecutors to bring these fears and concerns to the attention of the judge.

A great deal of time was also spent in this workshop on alternatives to the adversarial process, which was seen as emanating from a male history in the development of the judicial system. This was perhaps seen as especially important in family cases involving custody and access where it was also felt to be important that social and economic considerations not be given undue weight in custody and access decisions.

Concern was expressed with respect to mediation and conciliation models for those cases involving violence against women and children. And there was a particular concern expressed that mediation is perhaps never appropriate for situations of violence against disabled women because of the inherent, unavoidable and insurmountable imbalance in power between the participants.

Court-ordered and paid custody and access reports were stressed as an important element of these types of cases and concern was expressed over the overly technical and often very speedy resolution of these issues, even though there are delays in them coming to decision, that are often outside of the direct and meaningful participation of the parties themselves.

Inclusive community alternatives were stressed as an important aspect of inclusive justice. We heard about interesting programs in the Yukon involved in the land claims settlement, which would see community involvement in sentencing and healing and treatment of victims and offenders, and the use of the community where there is a definable community. Reliance on that community for guidance and supervision would seem to be very important.

It was recommended that the Department of Justice establish mechanisms to experiment with alternatives and to evaluate the implications for inclusive justice reform. While there was a suggestion that there perhaps could be an institute for inclusive justice created, there was also concern about further bureaucracy and that there are many public and private agencies that could be used or could be called upon to provide direction in that regard.

There was a suggestion that it be legally recognized that wife batterers and rapists are less appropriate parents and do not have the same custody and access rights as other men; this related to an element of zero tolerance. It was also suggested that there may be need for research in this area to determine whether, in divorce proceedings, custody and access awards, the impact of family violence was being properly taken into account.

The concept of a multi-door courthouse was also put forward as an element of alternatives to the adversarial system, where users of the system would have adversarial as well as Alternative Dispute Resolution (ADR) options available to them under one roof which are fully explained and fully accessible.

Under education and training, and similar to the principles stated in the access working group, it was recommended that mandatory sensitivity education for judges, police, prosecutors and all other participants in the court process be provided; that there be extensive public legal education to sensitize the public on the importance of these issues and the dangers involved, as well as comprehensive school programs and mandatory Continuing Legal Education (CLE) for lawyers on these issues. Special training was recommended for police and prosecutors in the investigation and presentation of evidence involved in sexual abuse cases and sexual assault cases to reduce the evidenciary barriers to either proceeding with charges or securing convictions that seem to exist in many cases.

There was also a recommendation that there be a widespread media campaign to make the public aware of the stereotypes and inappropriate attitudes that are prevalent in this area. Participaction, the federal government initiative, was mentioned as a possible model that was widespread.

With respect to judges, we heard of an effective affirmative action program -- which was supported very strongly by the group -- in Ontario for provincial court judges where female lawyers were approached directly and invited to apply for provincial court positions. There was a very large number of qualified applicants who came forward and as part of the result of that, there has been a 50 percent -- 50/50 -- appointment of men and women to the bench since that program started and since the provincial court bench was expanded in Ontario.

We also discussed the question of federal and provincial judicial councils and the accountability of judges for their conduct in the area of gender and other bias. And it was recommended that there be a review of those judicial councils, their range of disciplinary tools and the disciplinary actions that have been taken as a result of complaints over time.

Someone mentioned that provincial ombudsmen may have jurisdiction over judicial councils because of the way they are appointed and their administrative responsibilities; and it may be that complaints about action or inaction by judicial councils over concerns of judicial conduct could be brought to the attention of provincial ombudsmen offices.

Support services received a great deal of attention on a number of fronts. The main concern is the inadequate provision of legal aid services in family law across the country. It is a strong recommendation of this working group that the Department of Justice use its influence through the involvement of the federal government in funding legal aid services to ensure minimum standards nationally for coverage in family law, at least to the current level of services provided in Ontario, and there also be realistic and flexible financial eligibility criteria for family law cases.

A particular concern is relating family law coverage to criminal law coverage which does benefit through the federal/provincial cost-sharing agreement from minimum standards of coverage. In civil law, which is mainly involved with family law, there are no minimum standards at times of restraint or cutback. Then the family law services provided are cut back because there are no minimum standards.

In terms of First Nations issues, there were some specific recommendations that came out of this workshop involving mandatory cross-cultural training for all participants in the system and that these training sessions should be facilitated by aboriginal people. It was also felt that aboriginal staff should be insured in all levels of the court system, and that there may be federal funds and provincial funds available for on-the-job training programs to assist this. They also felt that recruitment of all court process staff include questions on aboriginal issues, sensitivity issues and that that be seen as an element of merit in a person's qualifications.

In terms of treatment and sentencing of aboriginal peoples, the importance of culturally appropriate and sensitized corrections staff and programs was stressed, as was knowledge of and sensitivity to aboriginal ceremonies, sacred objects and the timing required for these to be introduced appropriately.

The justice system must be accessible to women with disabilities. This means that the courts and legal aid offices must be accessible. It also means that professional interpreters for deaf people must be made available and that other interpreters or

support persons for people with disabilities are recognized. The justice system must also be accessible to women who do not speak either English or French. Aboriginal women and immigrant women -- whether witness, victims or accused persons -- need to understand and be able to participate in judicial procedures on an equal footing. This means that adequate interpreter services must be available and that information materials are required in languages other than English and French.

The sentencing workshop also dealt with many of these same issues and I would like to summarize the principles involved. The issues raised and the recommendations made by the sentencing group reflect the following: a concern that sentences are currently being imposed in an unimaginative, routine way without adequate consideration of individual circumstances, a desire to encourage a system of sentencing that involves input from the victim and community and that addresses the needs of both the victim and the accused; a concern about the incarceration of female offenders; a desire to see less incarceration of female offenders, and, if incarceration is imposed, to see that the place of incarceration reflects the needs of the offender; a concern about the safety of women; a desire to have the system operate effectively to protect women from abusive men; a concern about the effectiveness of the system in cases involving sexual assault and family violence and a desire to make the system more responsive to the needs of the victim in such cases; a desire to educate the people involved in the criminal justice system about the issues of gender bias, racism, rape trauma syndrome, etc.; a desire to create a system sensitive to particular needs -- for example, the creation of an aboriginal tribunal; a need to establish review processes to ensure that there are no disparities in sentencing based on gender or race; and a need to make the system accessible to all and to make it work for everyone.

These are just a few specific examples of those principles; the expanded recommendations will be in the proceedings. But a particular importance was put on the support for recommendations of the task force on federally sentenced women to choose a place of incarceration on the basis of ordinary residence, appropriateness of the facility, and the programs available; and particularly not to put women in institutions designed for men.

The overriding concern stressed by all of these working groups has been accountability, and that accountability of the ongoing process must be ensured through participation, in the preparation and implementation of action plans.

I would like to say in closing that, although I am sure all of us would like to believe that the principle of equal justice is fundamental to us, I am very aware of biases and lack of knowledge in my experience. But whatever the level of the insensitivities or ignorance in my own experience, I think that level is lower as a result of the last two days and I am grateful to the Minister of Justice for initiating and leading this

process; and also for all of the participants and particularly those who have shared very painful experiences, for assisting us to lower those levels of ignorance and insensitivity.

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING ACCESS (TRACK B.1)

BY MOBINA JAFFER, FACILITATOR

JUNE 10-12, 1991
VANCOUVER, B.C.

At the first session the agenda and any recommendations for procedure were set. There was concern that although access was considered the biggest issue, no judges were present in our group. This was put forth as a strong recommendation for the next symposium.

The group set as its target the examination of the structures which bar access and how to remove them in an effective and responsible way. Three issues were mentioned: legal aid; representation of more diverse interests (intervenor status); and court structure, facilities, paralegal.

Other issues examined were the economic and geographical barriers which bar access to justice. The group wanted to define whose justice system it was and if justice was possible within the existing system. The point was made that laws were originally to protect white men of property. Violence against women and family violence, heterosexual bias against lesbians and cultural bias need to be addressed. The underlying point was that the system of access is a myth; access is not a problem, getting someone to understand what you need when you're there is the real problem.

The question arose of whether to deal with colour as a gender issue, racial issue, or both. It was decided that they belonged together. It was felt that women of colour suffered doubly within the justice system. It was not uncommon for them to be treated unfairly by members of assistance boards, such as the Social Assistance Board (Welfare) and other administrative boards. Not only were women discriminated against because they were of colour but by the mere fact that they were women.

The group stressed the discrimination experienced by handicapped people in the justice system. Not only are they barred from participating fully in the legal process but in many cases are physically barred from entering buildings or courts by the very fact of their disability (i.e. wheelchairs). There are problems finding suitable interpreters for signage. In the case of mental patients, they cannot initiate civil suits and if they are charged and convicted they go to mental institutions to serve their sentences.

It was felt that native people have over-access to the justice system. Natives go through life experiencing bias as a normal course of events. The jails are full of natives who are not being rehabilitated. Healing lodges were spoken of as an alternative to jails. Another point taken up was the court system in the northern parts of Canada where there is a circuit judge. There is room for improvement in this system as time constraints on the judge (i.e. judge is in town for only a day or two to hear many different cases) does not allow him to hear cases as fully as he might otherwise be able to.

Concern was expressed for women who enter Canada on spousal visas. If their sponsor commits a violent act against them and they turn to legal assistance (police), the sponsor can withdraw their sponsorship and the immigrant is required to return to their country. Another concern was in the case where they are both immigrants and one spouse is abusing the other spouse. If there is legal intervention then both the abusive spouse and the victim are deported. Immigrant victims of violence feel isolated due to language and their immigrant status. Support systems should be encouraged in the community so that these women can seek assistance.

There was a great deal of discussion regarding the accessibility of our courts. It was felt that the court system needed to be simplified, and the language and forms made easier for the lay person to comprehend. It was stressed that the law-makers (i.e. police, judges) needed to be trained to be more sensitive to the needs of victims and that women should feel they are receiving fully competent legal assistance from legal aid. There should be more use made of paralegal and intervenors in the court system. In short, the legal system should become user friendly and a trusted system for all women, not a maze of hyperbole and archaic procedures and attitudes.

The group discussed whether their participation would mean anything. There was no confidence that the government would do anything. It was a problem of political will. The government was still knowingly and wilfully doing things contrary to what we were trying to do.

The need for a pervasive attitudinal change was the thread running through the discussion. To show political will is great politics. In New Brunswick, violence against women is the number one priority. Mechanisms must be put in place to change the system. It was agreed that they were detecting changes but slowly. The federal minister has little impact on provincial legislation. Change in laws must be done at different levels -- federal, provincial, municipal -- and we must keep pushing that message.

One participant used the native expression "walk what you talk." Federal officials concede prison for women is unliveable but continue putting women in this prison. Healing lodges are needed; not prisons for natives. She asked whether because natives attended the symposium, it was considered successful. Justice does not have the answer for natives. The adversarial system is wrong and using lawyers is not the native way of doing things. The white system is not superior to the native system. Sovereignty for natives is sought and honesty from this symposium is wanted.

It was expressed that women were asked to put the education and job security of prosecutors before the well-being of victimized women. A behavioral change must take place now for all women to get justice now. Behaviour must be changed where it can, as people in power will not change willingly. When there is political will, poor

legislation is passed, we must make sure we have input before any legislation is passed.

We must look at the people's experience with the system. Cultural difficulties must be addressed along with a rethinking of judges' roles and their objectivity. If they are not objective, they should be removed. When the term "gender bias" is used, the issue is bigger than that. It encompasses political accountability, access to justice, not the justice system. Natives should have their own system to get justice. There is a crisis in confidence with the justice system. The gatekeepers to the justice system (i.e., police, judges, prosecutors) are not in this session. What can this workshop do to cause these changes? We already know what doesn't work. We must impose deadlines on recommendations and recommend all groups of women be included.

The justice system was designed by men for men and is in crisis itself. The problems are not of our making. The justice system does not reflect the fundamental needs of the people and when we say we are not responsible for the system, we are washing our hands of the situation.

The point was made that there should be access to justice itself, and not the justice system. The justice system was set up to protect white men of property. The system is in crisis and does not address the needs of the people. We're talking about justice for women, issues of race, disabilities, and natives. Our concern is to change the justice system. Poverty criminalizes women. All recommendations should be sent to whichever department can effect changes. The following is a list of recommendations decided upon by the workshop.

1. Fundamental review of all laws that govern handicapped women (institutions, sterilization etc.).

2. Funding be available to disadvantaged groups for launching Charter challenges in provincial and federal courts.

3. Send a message to provinces who don't have programs to help women that unless they give aid, federal funding will not be provided.

4. Commitment at the provincial and federal level for cultural interpreters. People who understand where immigrants come from and can interpret for the court.

5. Promote research on people appointed to administrative tribunals and get feedback from people who access these tribunals.

6. Consumers' legal needs should be addressed to determine what is required.

7. Education is needed at the community level to assist in changes, i.e. education of citizens, commitment of federal government to educate communities possibly through schools.

8. Mandatory education of justice system, beginning with judges.

9. Failure of justice system to recognize aboriginal needs and implement an aboriginal system.

10. All governments in Canada should establish a framework about their equality stance.

11. Ministry of the Attorney General and federal government take an inventory of needs of disadvantaged women and take appropriate action.

12. Female prisoners should be moved from existing prisons and healing lodges should be investigated.

13. Administrative tribunals such as the Canadian Institute Administration of Justice and Canadian Council Administrating Tribunals to address problems.

14. Special programs and focus on recruitment programs for bicultural and bilingual people into the judicial system.

15. Continuity regarding our recommendations.

16. Concrete policy to eliminate federal government racism and sexism.

17. Include sexual orientation in rights legislation.

18. Implement measures to ensure these recommendations are put in place.

19. Courts are the tip of the iceberg. Because judges make controversial rulings, the public responds and the minister responds to the public. Place an emphasis on the courts.

20. Federal government to accept the concept of zero tolerance of violence and enact legislation to see it is reflected in the justice system. Set out guidelines for decision-making.

21. The provincial-federal task force on child support guidelines should consult with women who need child support. A monitoring group should be set up.

Justice should set up a public conference to assess progress on the symposium in one year. This will put importance on accountability.

22. Mandatory training for judges to help rebuild trust in the judiciary.

23. Appropriate initial and continuing education for officials on violence against women.

24. Members of all federally appointed task forces, royal committees etc. to mirror make-up of persons affected by task forces, except for blue ribbon panels.

25. As exists in Brazil, police stations specifically designed to provide services to women must be established in urban areas.

26. Government policies must be audited so that people are not further disadvantaged (e.g., *Class Proceedings Act* in Ontario).

27. Funding to groups denied in Ottawa regarding naming of groups; systemic discrimination.

28. Comprehensive legal care service; universal but community based.

29. Legal students must receive training on family and domestic violence (legal aid training).

30. Changes in Rape Shield law to remove consent provision.

31. Dignified access for disabled persons to courts, offices etc. The deaf should have adequate interpretation services, sign language for prisoners.

32. Homophobia in justice system should be openly talked about. It should be put on the Minister's list - no silence. Laws should be changed and judges and law students should receive training.

33. In future, official delegates from gay and lesbian groups should be invited.

34. Justice Minister should hold meeting with all Attorneys General to announce a two to three year campaign on access to justice for women.

35. Welfare should be amended so that persons receive assistance above the poverty line.

36. Resolution that publicly funded agencies (i.e., Legal Aid) reflect people being affected by it (representative board).

37. Put ourselves in present context (i.e., budgetary restraints); not come out with list without any follow-up. Mechanism should be set up for provinces to change laws. Specific recommendations should be sent to the provinces.

38. Disadvantaged native women and disabled groups be involved in constitutional talks.

39. Holistic approach to legal system - unify court services.

40. Pornography - police training on access to justice and violence issues.

41. Issue of *American Psycho* and pornography; get our own act together, look at the issue and make recommendations.

42. Poor forced into programs to solve problems (i.e., welfare recipients not free to decide in matters of maintenance enforcement payments). They are forced into other mediation situations. Delays in access (nine to ten months for maintenance enforcement plan).

43. Amend provincial welfare system. All recipients to keep more than $100 in other money (maintenance payments). Pay welfare above the poverty line.

44. Change in minimum wage. Uphold minimum wage for disabled.

45. More unified family courts (federal and provincial); Hamilton-Wentworth.

46. Nothing can be done with government cutbacks continuing. The government should stop all cutbacks to women's organizations. Full funding for the women's program should be restored on a permanent basis, including core funding and research funding to the Canadian Research Institute for the Advancement of Women (CRIAW) and other like-minded groups.

    a) Poverty - the feminization of poverty covers all groups and is of paramount importance.

    b) Provincial and federal jurisdiction - the committee should give provinces their responsibilities and the federal government theirs.

    A provincial committee on access to justice should be set up and they should receive all our recommendations.

47. There be recognition of the complete failure of the institutionalized justice system to serve the needs of aboriginal women and all aboriginal peoples and that resources be put in place and barriers removed to allow aboriginal peoples to reactivate their own justice system recognizing the long-term goal of self-government.

48. An explanation was requested as to why there are only two women on the Supreme Court. Is it correct to assume that a well-qualified woman was not available to replace Bertha Wilson?

49. A presentation from Correctional Services Canada must be given to the advisory committee on the task force of federally sentenced women on the proposed healing lodge for aboriginal women. All decisions regarding the physical plan and programming must be endorsed by the aboriginal representatives on the advisory committee.

50. Reasoning behind the Department of Justice's decision to challenge the Wedge ruling that allows an aboriginal women to serve a federal sentence in her home province (Saskatchewan) must be shared with Canadian women.

51. When requested, aboriginal people must be allowed to establish their own way of dealing with what they define as socially unacceptable behaviour.

52. Given that access to the justice system and justice involves creating an informed legally literate citizenry capable of understanding and interacting with the justice system, to have their legal problems and needs resolved justly and able to participate in the process of changing the system to meet their individual and group needs, and

    Given that programs of public legal education vary greatly between different provinces and territories,

    Be it resolved that:

    a) governments ensure that funding is available to community groups to design programs to meet their legal needs

    b) governments strongly support the efforts of public legal education organizations across the country to ensure that similar levels of services are available in all parts of the country

(c) governments encourage ministries of education to meet and ensure that students in Canadian schools receive the necessary legal education required to be informed and active citizens

(d) governments support efforts aimed at ensuring that the judiciary and other justice system staff receive training on the needs of new Canadian women, poor women etc.

53. Provincial ministries of the Attorney General, and the federal Department of Justice should conduct an audit of the needs of immigrant women with respect to the justice system (in its broadest definition) paying particular attention to the needs of women who are especially disadvantaged by reason of poverty, race, language, cultural origin or being victims of abuse and place high priority on meeting those needs.

SUMMARY

The access group reached consensus on the following principles and priorities. Specific recommendations should be interpreted in light of these. They also provide criteria for assessing the success of the implementation of recommendations.

(1) Women's concern is access to justice, not merely access to the justice system.

Women's concern is also access to justice for all women. This means that the fundamental problem cannot be corrected by addressing only sex discrimination. Race discrimination and discrimination because of disability, poverty and sexual orientation must also be addressed at the same time.

(2) The poverty of women is a priority and must be addressed if some are to enjoy justice. The justice system criminalizes women who are poor yet access to justice is also barred. Women experience both too much and too little access.

(3) Aboriginal women also experience too much access to justice. First Nations women are criminalized in disproportionate numbers because of sex, race and poverty. On the other hand, the justice system does not protect or defend them. The white justice system oppresses First Nations women.

(4) Violence against women must be addressed as a priority in all forums, by all decision-makers and actors in the justice system. Policies of zero tolerance should be implemented.

(5) For women, the justice system is in crisis. As a priority, a major campaign should be undertaken over the next two years by federal and provincial governments acting both independently and cooperatively to ensure access to justice for women. Mechanisms should be designed to make the process of implementation accountable to women and to ensure that women are consulted throughout.

(6) Mandatory training and education programs on issues of the equality of all women is required for decision-makers and access at all levels in the justice system.

(7) As a priority, women in all their diversity, including First Nations women, women of colour, women with disabilities and lesbians, be appointed to all bodies involved in the administration of justice.

(8) Funding must be provided to make access to justice for women a reality. This means, among other things, that funding to women's organizations should be restored to ensure that women can participate in the transformation of the justice system to a just system for women.

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING COURT PROCESS (TRACK B.2)

BY STEPHEN OWEN, FACILITATOR

JUNE 10-12, 1991
VANCOUVER, B.C.

This group was a very diverse one, with many participants who had different backgrounds and different ideas. These notes attempt to reflect the ideas on which there was consensus and also set out other points that were made by various participants. This second group of suggestions was discussed in the working sessions but no agreement was reached on them by the group.

In addition, and notwithstanding the support for an inclusive system of justice, the disabled and First Nations participants preferred to have issues that relate to their particular concerns separated from the other suggestions.

There was consensus in the group that aboriginal women, women of colour, women with disabilities and women in poverty are subject to significant disadvantages beyond those experienced generally by all women.

In addition, although generally the mood of this group was a positive one, there was concern expressed about the time allotted as being too short to deal with all the issues that fall into the category of "court process".

1. VICTIMS' SERVICES AND RIGHTS

Consensus Suggestions

- outside agencies or counsellors, located physically at court but not part of the "court system", to acquaint victims with the court system, including a general explanation of the system and who people in the system are, an explanation of why the system sometimes takes so long, why charges are not always laid, why acquittal does not necessarily invalidate a complaint, an explanation of victims' rights, and coordination of translation services where victims require them

- escorting of victims to court (if desired)

- mandatory victim impact statements - prosecutor should have a duty to bring victims' concerns to the attention of the judge

- education of police and prosecutors is required to sensitize them to victims' feelings

- protection of victims of sexual abuse and assault in court process (i.e., use of screens, closed circuit technology, and other innovative methods for presentation of evidence)

Particular Suggestions

- contrary to the situation currently in place, the job of the prosecutors should be, at least in part, to empower the victims in seeking justice

- victims should have a special status higher than that of ordinary witnesses

- education and counselling of victims is not sufficient; there are changes that must be made to the system to ensure that it is responsive to victims

- promotion and funding of family violence courts, as in Winnipeg (victim-centred approach)

- there should be a mandatory pre-trial publication ban of the identity of victims

- we should not lose sight of protection for accused in zeal for protection of victims

2. ALTERNATIVES TO ADVERSARIAL COURT PROCESS

Consensus Suggestions

- a more holistic view of justice, emphasizing protection, responsibility and repairing the harm that people do to people, is preferable to the current adversarial model

- mediation model for family law (custody, access) cases, but suitability for custody and access should not be based on socio-economic criteria which favour men. An observation was made that because of the inherent imbalance of power, mediation was never an appropriate choice when one of the parties is disabled

- court should order and pay for experts' reports on custody and access

- courts should recognize that violent parents are inappropriate people to have custody of, and unsupervised access to, children even if the violence has been directed to spouses rather than children in the past. An observation was made that the legislation might be amended to reflect this view.

- sentencing: there should be inclusive, community alternatives to incarceration (there has been some experimentation in the Yukon with respect to aboriginal community alternative healing)

- there should be funding available for research, whether through existing facilities or through an institute for inclusive justice, to recommend and monitor alternatives to the adversarial court process as well as to assess whether or not current treatment models involving violent conduct are in fact working. An observation was made that the justice system is reactive and that what is needed is something more proactive, that can deal with underlying societal problems

- the "multi-door courthouse" - all services, including counselling and mediation, under one roof, so that victims or other people using the system do not have to shop around to find the services they need

- within the "inclusive justice" model, there is still a need for different approaches based on the kind of case (criminal or civil), the kind of crime (property or person), the setting of the case (urban or rural), whether or not the people involved are aboriginal, visible minorities, disabled, etc.

Particular Suggestions

- there is evidence that many crimes are linked to alcohol and drug abuse and there is evidence that treatment programs are not working, so there should be a re-evaluation of the links between alcohol and drug abuse and crime and perhaps use of a medical instead of necessarily a criminal model

- mediation is inappropriate in cases of violent crime

- as issues are not uniform, an inclusive yet flexible series of court processes that can be tailored to fit the various situations is required.

3. EDUCATION AND TRAINING

Consensus Suggestions

- mandatory sensitivity education for judges, prosecutors, police

- ensure that applicants for positions within the justice system demonstrate knowledge of and sensitivity to gender and cultural issues

- public legal education should begin at school to sensitize children to gender bias issues

- continuing mandatory legal education for all lawyers to sensitize them as well

- special training for police and prosecutors with respect to training and presentation of sexual abuse cases

- media campaign (on the "Participaction" model) to make the public aware of stereotypes and inappropriate attitudes

4. JUDGES

Consensus Suggestions

- affirmative action to encourage the applications of women (Ontario's recent pilot project for the provincial court could perhaps be used as a model), as well as the applications of visible minority judges

- review the range of disciplinary action available to judicial councils, as well as their composition (to ensure that the community is well-represented on those councils)

Particular Suggestions

- judges need not be so isolated: only by being in the community will the judges really be able to understand what the litigants are experiencing

5. SUPPORT SERVICES

Consensus Suggestions

- ensure minimum national standards for family law legal aid, at least equal to the current Ontario standards, with realistic and flexible financial eligibility criteria

- ensure that professional and court-remunerated linguistic and cultural interpreters are available to victims and witnesses, as well as the accused in criminal matters

Particular Suggestions

- the money currently available to be used for support services should be more equitably divided up so that everyone who needs, for example, legal aid services should have equal access to it

- (this resolution is from the recent Banff conference) "That the federal government be urged to fund a national task force to commence in 1991 to collect data for publication on overt gender bias, which includes aboriginal, disabled persons, sexual orientation and visible minority concerns, in the legal system, the members of which are to be appointed by the Women's Legal Education and Action Fund (LEAF)

6. FIRST NATIONS ISSUES

Consensus Suggestions

- ensure mandatory cross-cultural training for all participants in the system, facilitated by aboriginal people

- recruit aboriginal employees in the system, with on-the-job training where required

- when recruiting other participants in the system, include questions on aboriginal issues and ensure that awareness of these issues is a positive criterion for hiring

- when treating or incarcerating aboriginal offenders, ensure that corrections staff respect sacred objects and that rituals (i.e., sweat lodges) are respected

Particular Suggestions

- instead of having native court workers explaining the mainstream court system to aboriginal people, perhaps the aboriginal people should have their own system

- when dealing with gender issues in the First Nations peoples context, it is important to remember that First Nations peoples look at the issues from an inclusive point of view emphasizing family and community over divisions based on gender

- self-government initiatives for First Nations peoples should be supported

7. DISABLED PERSONS ISSUES

Consensus Suggestions

(Note: at the request of one of the disabled persons in the working group, the following three recommendations from the pre-conference meeting were read into the record verbatim)

The justice system must be accessible to women with disabilities. This means that courts and legal aid offices must be accessible; it also means that professional interpreters for deaf people must be available and that other interpreters or support persons for people with disabilities are recognized (such as bliss symbol interpreters, support persons for persons with mental disabilities, etc.)

The justice system must also be accessible to women who do not speak either English or French. Aboriginal women and immigrant women, whether witnesses, victims, or accused persons, need to understand and be able to participate in judicial procedures on an equal footing. This means that adequate interpreter services must be available and that informational materials are required in languages other than English and French.

More feminist judges should be appointed. Selection processes should be reviewed and changed to ensure that feminism is a positive and not a negative factor in the selection of judges.

Particular Suggestions

- it should not be assumed that because a person is disabled, that person is not fit to stand trial

- court interpreters should be salaried and their credentials should be officially recognized by certification

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING SENTENCING (TRACK B.3)

BY MAJOR DONNA HOWELL, FACILITATOR

JUNE 10-12, 1991
VANCOUVER, B.C.

This subtrack, comprised of approximately 26 participants, was led by Major Donna Howell. At the first session, "Naming the Issues", the participants identified a series of approximately 50 concerns that were considered to be of interest under the general rubric of sentencing issues. The participants then divided those issues into four major groups: education; community alternatives; cultural/social context; and systemic considerations.

The participants then selected the group which was of particular interest to them. Groups 1 (Education) and 3 (Cultural/Social Context) were joined such that the participants ultimately were divided into three groups of approximately the same size. The groups then used the work sessions on Tuesday to clarify the issues and develop recommendations. Each group appointed a rapporteur who was responsible for writing out the recommendations of the group. Each rapporteur read out the recommendations of her/his group to all participants at the conclusion of the final workshop on Tuesday. The rapporteurs then gave their handwritten lists of their recommendations to the rapporteur for the sentencing subtrack for the purposes of preparing this report. The list of recommendations made by each group forms the basis of this report.

RECOMMENDATIONS

Sentencing Issues Relating to Education and Cultural/Social Context

1. TRAINING

i) Training programs should be provided on an ongoing mandatory basis to peace officers, probation officers, judges, Crown prosecutors, court workers, social workers, legislators, media, interpreters/translators, law students, parole board members and all other persons associated with the criminal justice system;

ii) Content/curriculum of the training programs should focus on, but not be limited to, these issues:

- gender bias
- racism
- the needs of "differently abled" persons (e.g., space availability, the limitations of signing)
- homophobia
- rape trauma syndrome
- long term effects of victimization;

iii) Training should include personal testimonials from individuals who have suffered from or experienced the effects of the above-noted issues;

iv) Training should be conducted in plain language;

v) Information used in training programs (i.e., education materials) should be current; literature should be updated to be more sensitive to reality (e.g., "Aboriginal" and "Black" currently appear in texts in lowercase whereas "French" and "British" appear in uppercase);

vi) A duty judge should be provided to enable judges to engage in training without jeopardizing the busy court schedule.

2. COMMUNITY INVOLVEMENT IN SENTENCING

i) Appropriate community groups (e.g., elders' council) should be consulted prior to sentencing to assist in the determination of proper sentence;

ii) The community involvement should include social workers, R.C.M.P., health workers, band members;

iii) Victim/offender reconciliation programs should be examined as an alternative to the adversarial system;

iv) A factor to be considered in the length of sentence imposed should be the degree of breach of trust or authority involved;

v) Aboriginal offenders should be referred to an aboriginal tribunal for the hearing of their cases.

3. CULTURAL SENSITIZATION

An ongoing review process should be established to examine disparities in sentencing of people of colour (e.g., Beverly Johnston case vs. Carley Nerland case - both in Saskatchewan - aboriginal female vs. white male)

4. HOLISTIC APPROACH

i) Funds should be provided to treat the family and the community of the offender;

ii) Incarceration is not working. As an alternative, and in appropriate cases (not life threatening), funding should be provided to establish healing programs and training programs for the offender.

5. POVERTY

The majority of women incarcerated are in prisons as a result of minor property crimes or prostitution. Women should not be imprisoned for stealing to survive, for non-payment of fines. The offender should be sentenced to perform volunteer work in community, to receive skills for survival, and options for help (i.e., financial counselling, coping skills). The fine option program should be applicable in all jurisdictions.

6. ACCESSIBILITY

i) Court support services should be provided, on a mandatory basis, for both victim and offender (e.g., how to dress and speak, how to present evidence in a comfortable, enabling environment, provision of court communicators);

ii) Victim impact statements should be reviewed, on a mandatory basis, before sentencing.

7. PLACE FOR SENTENCE

i) Female offenders should be able to serve their sentences in institutions in close proximity to their family and community support systems.

8. SEXUAL ASSAULT TEAMS

i) Sexual assault teams should be established in all jurisdictions. The teams should include: Crown prosecutor, physician, police/R.C.M.P., community support worker/advocate, and should be sensitive to the impact of the assault on the victim. The teams would provide support during the court process and the ongoing healing process.

Sentencing - Community Alternatives

1. In cases of violence against women and children, an offender should receive, prior to sentencing, a mandatory assessment which includes interdisciplinary community input and, if the offender is amenable to treatment, an appropriate treatment program should be mandated as part of the sentence disposition to be monitored on a periodic basis.

2. Treatment should not be a substitute for other principles of sentencing, especially those relating to the safety of the victim(s) and the public.

3. Sexual offenders and wife assaulters should receive lengthy treatment and therefore, provision should be made for indeterminate probation orders under the *Criminal Code* as well as probation orders in conjunction with federal sentences.

4. Women should not be incarcerated for non-payment of fines.

5. The criteria for expert witnesses should be broadened, in the pre-sentencing process, to include a wider range of community input.

6. The feasibility of more public disclosure should be explored as an example of a non-adversarial approach to sentencing. For example, the victim could be present during discussions between the Crown and defence wherein information is being disclosed. Victim impact statements could be considered. The victim could be present during "plea bargaining" discussions.

7. Law school training should emphasize the use and advantage of non-adversarial models in the legal process.

8. There should be a clear recognition that women who are convicted of criminal offenses often have long histories of victimization, poverty and gender discrimination. The justice system must therefore consider these issues and include appropriate treatment/rehabilitation in sentencing.

9. Universal use of victim impact statements and community impact statements should be encouraged.

10. Community liaison services should be available to the court prior to sentencing to indicate what resources are available for both the offender and the victim.

11. The victim surcharge legislation should be implemented consistently and universally by providing the appropriate level of transitional funding to get this program started provincially and territorially. The revenue from this surcharge should be used to fund victim services.

12. Believing that incarceration is overused in Canada, the sentencing of offenders should be based on the principles of prevention, education, and community involvement and should reflect appropriateness to the specific situation with due regard to the needs of the offender and of the victim. Government funding for enhanced community resources should be made available.

13. Sentencing should be sensitive to the needs and realities of visible minorities and these groups should be included in decision-making regarding the sentencing process.

14. The "reasonable man" standard needs to be expanded to include the realities of women.

15. The recommendations of the task force on federally sentenced women should be supported fully and the Solicitor General should be urged to make an announcement regarding the locations of the four regional centres and the healing lodge before Parliament adjourns for the summer.

16. The system is not adequately responding to life-threatening risks of battered women. In view of this known risk, the Department of Justice should look seriously at effective protection measures throughout all stages of the justice process (e.g., education at schools, more effective restraining orders, use of dangerous offender legislation, use of innovative treatment programs).

17. Testimony from the victims of sexual and physical assault should be obtained in the least obtrusive manner exercising sensitivity to the very real secondary victimization imposed by the court process. Use of alternative technology, such as videotape and screens, should be encouraged through pilot projects in selected sites with appropriate program evaluation. Cases of sexual and physical assault should be fast-tracked through the courts with no tolerance for unnecessary delays.

18. Resources should be made available to the provinces so that uniform assessments of sexual offenders and other offenders of family violence are completed in all cases. These assessments need to be done by an interdisciplinary team which is trained and knowledgeable in the area of risk assessment as it relates to recidivism, victim impact, concepts of relapse prevention and amenability to treatment.

19. The use of sentencing options which already exist within the Criminal Code must be actively encouraged across Canada as viable alternatives to incarceration and innovations to the court process (e.g., fine options, community service orders, court mediation, adult diversion). Government funding should be made available to support the community organizations that deliver these options.

20. In family violence cases where an offender represents himself, the offender should not be allowed to cross-examine the victim.

21. The Department of Justice must investigate the current potential under our present laws to remove from their homes, men who assault their partners. However, the safety of women and children must remain the highest priority and women should retain the option of going to a transition house if they wish.

22. The federal Department of Justice should seriously investigate the viability and potential of widespread use of delays/adjournments to sentences in child sexual abuse and wife assault cases in order to:

    a) protect the victim(s) and reduce the potential for reoffending though separation of victim(s) and offender;
    b) provide appropriate long-term support, advocacy and treatment for the offender and victim(s);
    c) ensure that community support for victim(s) as well as education concerning reality of violence between family members be maximized.

Systemic Issues in Sentencing

1. Information about systemic problems/issues/solutions should be diffused throughout the justice system to all agencies which have responsibility for sentencing (such as Correctional Service Canada, judiciary, legal staff, etc.).

2. Certain kinds of offenses and/or offenders require innovative approaches to sentencing. For example, the sentence imposed could be made by a court having the benefit of a community-based panel whose input could be requested by counsel or ordered by the court. This panel would provide access to the community, and make the judicial system more responsive.

3. The powers of the judicial council should be reviewed to consider:

    a) more public nature of hearings;
    b) wider range of dispositional alternatives;
    c) continuation and disposition of hearing regardless of whether the judge resigns prior to its conclusion;
    d) routine evaluation of competence and conduct.

4. The selection process for judicial office should be more open and responsive to the needs of women.

5. If a person is to be incarcerated, the place of incarceration should be chosen on the basis of factors such as proximity to home and family, the appropriateness of the facility and the availability of programs.

6. It is inappropriate to house women in custodial institutions designed for men. Women prisoners currently held in this manner should be removed immediately to more appropriate facilities. If no such appropriate facilities exist, they should be developed.

7. The safety and security of women should be statutorily recognized as a fundamental principle in matters of sentencing and bail.

8. The sentencing process must take account of the realities of social context for women, in order that appropriate dispositions are reached for female offenders.

9. Racism and sexism are linked in their aspects of dominance, power and cruelty, and therefore it ought to be a principle of sentencing, statutorily enacted, that crimes which are race or gender motivated are deserving of greater punishment.

10. Sentencing alternatives must consider the social and cultural realities of rural and remote communities so that creative options can be ordered by the court, to ensure reasonable consistency between urban and non-urban centres.

11. Uniform enforcement and prosecution policies should be developed in all federal-provincial-territorial jurisdictions, to recognize that female victims who refuse to testify do so for a variety of complex reasons, which may have nothing to do with contempt for judicial proceedings, and to ensure that the victimized woman is not doubly penalized.

12. Urgent recognition must be given to the serious problem of women who die at the hands of their abusers, and in particular, the pattern of violence and harassment which often precedes the homicidal act. The Minister of Justice should table this at the forthcoming meeting of federal-provincial-territorial ministers responsible for justice as an item for priority action. Officials should be directed to search for alternative, creative and effective solutions for the protection of women in such situations.

13. The work of the symposium should be continued in some form, on a regular basis, so that all of the players can be brought together or regularly consulted for the purpose of eliminating gender bias and protecting women from violence.

III

GENDER AND THE PEOPLE OF THE LAW

-Selection Processes (Track C.1)

-Education and Training (Track C.2)

-Work and Gender (Track C.3)

SUMMARY OF
"GENDER AND THE PEOPLE OF THE LAW"

presented by

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NATIONAL SYMPOSIUM ON WOMEN, LAW
AND THE ADMINISTRATION OF JUSTICE

JUNE 12, 1991
VANCOUVER, B.C.

Tradditore, tradditore. To translate is to betray and yet this is what I am at this moment preparing to do, in transposing some, but only some, of the recommendations formulated during the work of Track C, which focused on the theme "gender and the people of the law", into summary form. Unfortunately, the reporting exercise will also, inevitably, be an exercise in reduction, given the time constraints involved. And so you will forgive me if I make editorial choices, which were pretty well agreed to by the animators of the workshops, based on the priorities expressed by the workshop participants. In dealing with the general theme of the legal professions, participants considered three topics:

- selective processes;
- work and gender;
- legal education and training.

Some participants questioned whether it was appropriate to have workshops devoted to the legal profession: were we in fact indulging in navel-gazing?

I will therefore take the liberty of starting my report with another proverb and a quotation, which serve as metaphors to explain the justification for allocating a track in this symposium to the legal professions.

The proverb comes to us from Rwanda, and is born of a rare grassroots wisdom:

> The action of a single woman is worth more than the words of a hundred men.

The quotation is taken from Lewis Carroll's *Through the Looking Glass and What Alice Found There*, and consists in a brief dialogue between Alice and Humpty Dumpty:

> When I use a word, Humpty Dumpty said in a rather scornful tone, it means just what I choose it to mean - neither more nor less.
>
> The question is, said Alice, whether you can make words mean different things.
>
> The question is, said Humpty Dumpty, which is to be the master - that's all.

This quotation, and the proverb I recited a few moments ago, both speak of the problems under which our system of justice labours, as well as of the remedy that we must bring to it.

In other words, who got to be the master in our justice system and define the rules and the words of the game? Who but the people of the legal system from daily experience on the inside; a legal system made in the image of its master, the master who defined it: the white man, sound of body ... and sometimes of mind.

If we want our legal system to reflect points of view other than the white man's point of view, if we don't want judges to go on deciding that a woman who says "no" to sex is really saying "yes", it is absolutely imperative that other voices be heard there, on the inside of our system of justice, and make a meaningful contribution to developing new standards of what is normal.

But how do we achieve this objective? First, by ensuring that women in general, and native women, visible minority women, disabled women in particular, are represented in the various legal professions. Power is not exercised in absentia.

1. The first recommendation, which is of primordial importance and received a broad consensus in our workshops, may be subdivided into several sub-recommendations:

   - The federal, territorial and provincial governments should immediately take concerted action to implement affirmative action programs to improve access by women and minorities (native women or women from other ethnic communities, disabled women) to the bench and to administrative tribunals, in a proportion at least equal to their representation in the legal professions.

   - The selection committees which advise the various governments within the process of appointing judges and members of administrative tribunals should be genuinely representative of the Canadian public, and should therefore be at least 50 percent women.

   - These requirements mean that in some cases we will have to do away with the rule that appointments to the bench are made after ten years of toiling at the bar. This ten-year requirement operates to prevent native and visible minority or disabled women, in particular, from being appointed to what should be a more representative bench. And we should most especially not, as is often discussed, raise the requirement to 15 years, which would exclude even more women from the bench.

   - The federal, territorial and provincial governments should cease using partisan political affiliation as a selection criterion, since it places women, who are notoriously badly connected because they are excluded from politics, at a disadvantage.

- Law faculties must immediately adopt affirmative action programs designed to promote the hiring of female professors from the native and visible minority communities, disabled women, and so on.

  By the year 2000, women must make up at least 50 percent of the teaching staff in faculties of law.

  Representation of other groups must be based on their numbers in Canadian society, and the diversity of our society must be reflected by law professors.

- Governments and faculties of law should be required to publish an annual report stating the progress made in achieving the objectives set out above.

2. But affirmative action programs will not be enough, without the supportive measures set out in the second recommendation, which is also subdivided:

   - Whether the issue is access to law faculties, as professors or as students, or admission to the provincial bars, to the Quebec Chamber of Notaries, or to police forces, or access to the bench, the decision-makers in the selection process should revise and redefine the concepts of excellence, objectivity and neutrality, to purge these concepts of all sexist, racist, Eurocentric, homophobic or other discriminatory prejudices which may taint them.

   - In order to promote the hiring and integration of women at all levels of the legal profession, to offer role models that are both meaningful and varied, law faculties and different professional groups (provincial bars, Chamber of Notaries, the Bench, etc.) must establish mentor programs.

3. In order to promote the reform of the customs of the legal world, to attract and especially to retain women (their drop out rate being high), working conditions that are compatible with personal and family life must be both encouraged and established. Here are some quick examples:

   - Law offices, Notaries, governments and corporations that employ lawyers, as well as the Bench, must seriously consider and implement conditions of employment that include part-time work, job-sharing, a compressed work week, maternity leave, parental or family leave, periodic sabbatical leave and study leave, that would guarantee continued employment or the maintenance of professional status.

- Law firm management committees, in particular, should put these alternatives on their agenda.

- These alternatives to the traditional structure of legal work should also be integrated systematically into continuing education courses given by professional bodies in the area of time and practice management.

- Professional bodies should, in cooperation with employers in the legal professions, get actively involved in childcare, and both establish and financially support childcare centres in the workplace.

- Professional bodies should adopt policies which allow for a reduction of professional membership fees and insurance premiums for people who work otherwise than on a full-time basis, or people who take long-term maternity, parental or family leave.

- Professional associations should also establish employee replacement services ("locums"), primarily to serve small firms during a staff member's maternity, parental or family leave.

- Professional corporations should establish minimum mandatory standards in the area of maternity leave for their female members, and their enabling legislation should, if necessary, be amended to permit such regulation.

4. Not only do the working conditions of lawyers and other workers in the legal sector have to be consistent with the demands of family life, which still fall to women, but the working atmosphere too must take them into account. Accordingly:

- Sexual, sexist or racist harassment should be expressly defined as constituting unprofessional conduct and subject to sanctions under the codes of ethics of the legal professions, including that of the judiciary.

- Professional associations, in cooperation with employers in the legal sector, should lay down anti-sexism, anti-racism and anti-discrimination rules and establish programs to raise awareness and provide education in this area.

5. Since legal professionals and their associations sometimes need a little push, if not a big shove, we also recommend that:

   - The federal government expressly distribute to law firms and other suppliers of legal services the present policy which makes the awarding of certain contracts subject to compliance with employment equity programs.

   - The territorial and provincial governments adopt similar policies, if they have not already done so.

6. Finally, education and training are an important aspect of the process of transforming our system of justice. Our recommendations:

   - Law faculties should reconstruct their curricula in order to make systematic provision for the inclusion of the points of view of women, native people, visible minorities and lesbians and gay men.

   - There must be radical changes in teaching methods, so that we move away from the lecture course and instead put the emphasis on practical learning, small-group work and interactive methods which make it genuinely possible to include non-traditional points of view.

   - We must ensure that capable faculty are hired to provide effective support for students from communities which have traditionally been excluded from law faculties.

   - We must facilitate the integration of immigrant or refugee women in the legal professions, and provide them with appropriate and adequate financial and personal support.

   - The Council of Canadian Law Deans should develop a clear and explicit policy to eliminate sexism, racism and discriminatory attitudes, which persist in law faculties and which block access to legal education.

   - The physical safety of women on university campuses, where assaults frequently occur, must be guaranteed.

   - With respect to judges' training, it is not sufficient to provide them with the usual material: they must be put into direct contact with representatives of members of the groups to which they will render, or fail to render, justice: women, ethnic groups, native people, battered

women, doubly or triply disadvantaged women. There is nothing like direct contact to promote examination of one's own attitudes.

- A survey must be done of all training given by legal and non-legal groups (by which we mean community groups, feminist groups, groups representing ethnic minorities, and so on) so that an inventory may be prepared listing all human and material resources available. This survey should be carried out by the federal Department of Justice, which should then distribute the inventory to interested groups and individuals.

- More generally, our entire society needs to be made more aware of these issues. Even before looking at our law faculties, we should examine the educational system in general, from kindergarten to university. The competent authorities (ministries of education, school boards, colleges, universities) should consider the issues of sexual equality and diversity and display zero tolerance for sexist or racist attitudes, violent attitudes, domestic violence and so on.

7. Finally, I shall close this report on this point: women from all kinds of backgrounds should continue to lay siege to the loci of professional power and become agents of change. We are still in the pioneer days of this process, and it is up to you, to us all, to spread the word.

And since the action of a single woman is worth the words of a hundred men, we recommend to the Minister that she take tangible and concrete action to follow up on this symposium within the next 18 months.

I would like to thank everyone, and particularly the interpreters.

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING SELECTION PROCESSES (TRACK C.1)

BY SYLVIANE BORENSTEIN, FACILITATOR

JUNE 10-12, 1991
VANCOUVER, B.C.

RECOMMENDATIONS[1]

1. The federal, provincial and territorial governments should immediately implement equity programs to promote access by women including women from minority groups[2] to the bench and to administrative tribunals.

2. Law faculties should immediately adopt employment equity programs to promote the recruitment, hiring and promotion to tenure track positions of women, including women from minority groups, as professors.

   By the year 2000, women should constitute at least 50 percent of the academic tenured staff of law faculties.

   The number of women from minority groups among the academic staff of law faculties should be increased to reflect the diversity of the Canadian population.

3. The selection committees which advise the various levels of government within the framework of the appointment process for judges and members of administrative tribunals should be representative of the reality of the Canadian population and should include at least 50 percent women including women from minority groups.

4. The decision-makers in the selection process for the appointment of judges, members of administrative tribunals and professors of law faculties should take a fresh look at and redefine the concepts of excellence, objectivity and neutrality. This will eliminate from these concepts prejudices, including sexism, racism, the rejection of non-Western values, and other forms of discrimination, that tarnish them and systematically exclude women, native people and other minorities.

5. In order to change the image of the bench (so as to obtain a more representative picture of the presence of women, native people and minorities in society) the criteria used to evaluate candidates should be redefined to recognize different combinations of experience and expertise. This would

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[1] The recommendations are not ranked by priority.

[2] The term "minorities" or "minority groups" used in the text is defined as including aboriginal persons, persons with disabilities and persons from visible minorities.

involve giving greater importance to the life experience of women and minorities (e.g., in evaluating a candidate's social commitment, it should be recognized that for a woman to have raised children constitutes a commitment to the community).

6. The criteria used to evaluate candidates for the bench and the way in which these criteria are applied should be well-known to all potential candidates.

7. To facilitate greater representation of women and persons from minority groups on the bench, members of candidate selection committees for the bench should be authorized to abandon the criterion of ten years of practising law.

8. The members of selection committees at all levels of the judicial system should receive adequate anti-racism and anti-sexism training which will enable them to recognize the biases in the values and perspectives that they bring to the decision-making process and develop appropriate strategies for a non-discriminatory selection procedure.

9. Law faculties and the various professional associations should implement sponsorship programs to facilitate access to the profession for under-represented groups such as women and minority groups.

10. Admission to law faculties should no longer be conditional on success as measured by the applicant's Law School Admission Test (LSAT) scores and Grade Point Average (GPA). Each application should be evaluated on a more human basis, and individual experience should be considered. From this perspective, the evaluation of each application should include the following elements: personal experience, work experience, academic training (including GPA), community involvement, specific personal considerations and the LSAT.

11. All decision-makers within the legal profession should adopt policies aimed at promoting education on sexual equality and discrimination, protecting the rights of women and persons from minority groups and imposing sanctions for any behaviour that is racist, sexist or contrary to the principles set forth in the *Canadian Charter of Rights and Freedoms* and other human rights legislation.

12. Systemic discrimination in society and in the judicial system should be denounced as having a negative impact on the integration of women and persons from minority groups. Selection criteria should ensure that these barriers are removed at the time of recruitment, hiring and promotion in law firms, the appointments to the bench and tribunals, selection for committees and working groups of legal bodies and associations, recommendations to task

forces, boards of inquiry, royal commissions and law faculties. The professional experience acquired in non-traditional areas of practice, small firms or as a sole practitioner should be given equivalent value to that of the candidate who brings experience and expertise from a large firm or organization.

13. A commission of inquiry with the power to implement its recommendations should be given the responsibility of studying the selection criteria used by law faculties for the admission of students, and the recruitment, hiring and promotion of professors. The policies, directives and practices of these institutions should also be examined, with particular emphasis on ensuring a non-discriminatory environment and curriculum.

14. The Justice Minister should report to us in 18 months on the follow-up to our recommendations.

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, THE LAW, AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING EDUCATION AND TRAINING (TRACK C.2)

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VANCOUVER, B.C.

Participants included judges, law deans, professors, teachers of judges and lawyers, representatives of aboriginal women's groups, representatives of multi-cultural groups, representatives of law foundations, law students, and a representative of R.E.A.L. Women.

The Consultation process for implementation of the recommendations made in the Symposium should be broadened to include more of the stakeholders in the system (students, victims, witnesses etc.). Aboriginal women and disabled women were under-represented in this session and the recommendations would have looked different had they been more of a presence. We recommend they be fully included at the implementation stage of these recommendations.

Participants were asked to identify the main issues facing the legal system in the area of education and training of its various practitioners. The main issues identified by the group were:

1. NAMING THE ISSUES

1.1 Law Schools

Does the law school curriculum need revision to reflect all facets of Canadian life?

> Are the perspectives of visible minorities, women, disabled persons and natives presented?
>
> What should be taught?
>
> How should it be taught?
>
> Who should teach it?

Does a tension exist between two concepts of the law school?

> Is the law school a place for instruction in legal standards or a place for socialization to issues?

Can law students who speak for women or visible minorities demonstrate that law is a conspirer in oppression?

> Does a classical view of legal education give these views any legitimacy?
>
> Does it limit social criticism of the law?

Are these students' views silenced by law professors who practice sexism or by law professors who underestimate its real daily impact on women?

Can we change the law schools by professional training for professors?

How do we develop standards for what to teach and how to teach it?

How do we best teach "women and the law"?

Is "women and the law" best taught as one course or integrated into all courses?

If integrated into all courses, is there a risk the issues will be taught badly and unsympathetically by hostile professors or by professors insensitive to issues of sexism?

If taught separately, will a short introduction - one week on "Women and The Law" - be all the instruction made available in three years of law school?

Are bridge courses - law and economics, law and history, law and feminism, law and politics - useful to put law into a true social context rather than teaching it as a system of neutral principles?

Do professors favour such courses and do they claim it infringes their academic freedom to teach?

Do we need a specific focus (a Chair in Women and the Law)?

Do we also need to ensure those issues are integrated into all law courses?

How do we improve or change professors as well as curriculum?

How does a professor of the dominant culture bring the views of a different culture?

How do we change professors who won't use gender-neutral language, even though faculty policy encourages it, and students request it?

Should law schools first publicly acknowledge this problem?

That traditional professors do not include gender or visible minority issues when teaching to "the reasonable man"?

Does their exclusionary teaching silence the expression of different views?

Is the law school an academically free place for women or visible minorities under these circumstances?

Does "silencing" occur when issues or factual elements important to women, visible minorities or native students are determined by white male conservative professors not to be legally relevant in the academic debate on a legal point or case?

Can a student feel vulnerable when raising such an issue in a classroom debate?

If a student has personal experience which contradicts the legal analysis of an issue (like rape or abortion), and is brave enough to raise it, will her voice be heard in a debate directed by the dominant group?

Can silencing also mean teaching legal issues -- abortion, rape, prostitution, discrimination -- in a way that excludes or is hostile to women's experience (probably the experience of women present in the classroom)?

Can silencing also be found where no or few courses exist in areas of interest to women -- e.g., implications of divorce and tax law for the feminization of poverty --marginalizing those issues?

Should not just curriculum, but choice of casebooks and texts, drafting of examination questions, and management of classroom discussion reflect, validate and be sensitive to women's reality and experience?

Should campuses provide an atmosphere indicating an awareness of women as people that is conducive to their learning?

Is it crucial that women's physical safety on campuses be assured?

Is learning impaired under conditions of intimidation?

1.2 Bar Admission Courses and Training

Is a different teaching model needed at bar admission than at law school?

While law school raises the substantive issues in the law, should bar admission consider how legal services are to be delivered?

How do we interpret social messages in interactions/transactions with clients, other counsel, and the legal system?

Is bar admission training changing over in most provinces, to a skills-oriented model, integrated with substantive knowledge?

How can sensitization to gender, racial and cultural issues be included in this?

Should it be considered part of "professionalism"?

How you treat all people with whom you deal?

Your obligation to be sensitive to their reality and experience?

How do you cope with a client who is afraid of the legal system, or of you, or both?

Should skills exercised be framed around fact patterns that raise some of these questions (family violence injunction applications, etc)?

Is bar admission a crucial last stage in formal education of lawyers?

Should the opportunity be taken to raise gender, race, native issues at this stage?

1.3 Continuing Legal Education (CLE)

Should sensitization to gender issues be part of "professionalism" in this context too?

Should CLE be mandatory:

39 US states say yes, no Canadian province currently requires it.

Is the voluntary participation rate in some provinces high enough?

If courses are made available on gender-related issues, can we guarantee attendance?

How do you get the people there who need to learn a new perspective?

1.4 Judicial Education

Should judicial education curricula reflect the reality of women's lives?

Should it include the fact that women face oppression unequally?

Do judges need to be trained to understand what it means to be a woman in Canada today?

Do judges need to participate more in society (as opposed to the present view of being somewhat separated from it)?

Should they be allowed to acquire an empathetic understanding of what it means to be a woman? A visible minority? An aboriginal person?

Is judicial education important?

Difficult?

Delicate?

Is it important to educate practising lawyers and law students, before they get to the bench; before they develop "judge-itis"?

Is it important to motivate judges to go to such training?

Are instructors at many programs to date preaching to the converted?

Is it important that judges go to the aboriginal communities to learn about women's realities from women themselves?

Do judges need to hear native peoples, rather than anthropologists and sociologists or other "experts" describe their culture?

How do we reach judges and cause them to see they need training to revise their attitudes?

Do judges think of themselves as biased?

Do they think they carry out their duties properly?

When they apply a neutral standard fairly?

Will mandatory training produce cosmetic changes which do not go to root attitudes?

Do we need ways to present women's reality to judges, based on measurable facts?

Will this allow them to see the inequities and make their decisions accordingly?

Do we need a non-confrontational approach?

Do we require direct interaction between judges and representatives of the various communities they serve?

Is it sufficient for judges to be made aware of bare facts (on say, the wage gap between male and female earners)?

Do we need the people who experience oppression explaining directly to judges what that is like, rather than having it interpreted by instructors who have not directly experienced those realities?

Should judges understand as much about the public sphere as do the people in it?

What are their experiences, their problems, what is their community?

Should judges talk about their own experiences too?

Should the information and candour be shared between the "victims" and the judges who learn from them?

Are most judges already acquainted with sexual assault victims?

Is there some question regarding the appropriateness of asking sexual assault victims to tell judges directly about their experiences?

Could this increase their victimization?

Does experience reveal that groups and individual survivors of sexual assault have asked to be involved directly in judicial education?

Is their ability to make judges understand their reality useful?

Could this be done sensitively in circumstances substantially controlled by those telling their experiences?

Does judicial education imply looking at and potentially altering the basic legal standards?

A comment was made at the Banff conference on gender issues in law: "this is the last decade of the white male dominated society".

If we start changing fundamental legal standards, should we think carefully about the stable elements with which to replace them?

How far can you go in judicial education without tampering with judicial independence?

Should judges talk about these issues among themselves?

Should the highest levels (Chief Justices), support such debate?

Should a very high level of peer support exist?

1.5 General

Is there a need to train the practitioners of the system (Department of Justice, Attorneys General) to be more sensitive to the cross-cultural needs of the Canadian community?

Is there a need to evaluate teaching and learning methods at all levels of legal education?

Is there a need to determine how to accommodate desired revisions to curriculum most effectively?

What are the requirements of effective spending of public money?

Have there been enough studies and commissions?

Is it better to consider how to rationalize the work, implement change and use the dollars most effectively?

1.6 Minority

Is there such thing as a woman's point of view?

Does it vary according to class, religion, etc.?

Is it paternalistic to assume all women are the same?

Should we be very careful not to take the point of view of a special interest group as representative of all women?

2. ARTICULATING THE GOALS

2.1 Introduction

The issue of silencing came up at this point within the group itself. Two women representing native women's organizations indicated at the commencement of session #3 that they had felt excluded by the level of the discussion the previous day, which had been predominantly led by law deans, judges and professors.

The facilitator indicated that their views, and those of the law students in the group, were critical as they were those of the users of the system. He suggested their views could be most useful if the educators first set out their plans to fix the problems and then those representing the people the system was intended to serve should provide comment on their suggestions. Discussion of the proposed solutions continued past the end of session #3.

The two native women's representatives did not return for session #4, and may well have joined a native women's group that brought recommendations to the floor the following day. It may be that the facilitator and rapporteur were not sufficiently attuned to the frustration expressed by these women, and ought to have given them the opportunity to speak when they first expressed their frustration. This may be a lesson for future symposia, as persons of native background, or representatives of other front line organizations, may be less outspoken and may feel silenced faced by persons -- like law professors and judges -- more used to speaking and being heard.

In Session #3, the facilitator indicated that the core theme gleaned from discussion the day before was the importance of changing attitudes. He asked the group to identify other specific goals that could prompt development of recommendations. Additional goals were identified as set out below. Discussion continued through Session #3 and #4, with the interaction of ideas between the educators and the clients of the system. The goals set out here are grouped by subject rather than by originator or the order in which they arose over the two sessions.

2.2 Law Schools

Law students need an atmosphere of safety -- from physical risk, emotional intimidation, a "poisoned atmosphere" of harassment on the basis of sex, race, native status, ethnicity, or sexual orientation. Harassment can be resulting from conduct by students or faculty, or misogynist and homophobic graffiti or anything in between. Students need to feel that they belong at their school. There is a need for specific guidelines at law schools setting out policy in these areas.

The physical security of women on campuses must be assured. It is important to find a way to convince disparate parts of the university community -- Student Association, Housing, Dean of Women, Dean of Law, etc. -- that women's safety is their issue. There is a need to convince universities first that they have an obligation to ensure women's safety on campus, and second that they have the resources to do so. Campuses can be arranged to be safer for women.

Law school needs to become less monolithic in its concept of its role of professional socialization. Legal education has to include criticism of classical legal precepts such as: the adversary system is effective and morally superior; rule of law is an invariable social good; administration of justice is neutral. A lawyer's role properly includes serving clients who are engaging in a class dispute or asserting collective rights. Law school should foster different kinds of legal professionals who will take radical perspectives on legal reform.

Teaching materials must be better designed. Choice of casebooks, exam questions, teaching cases must be sensitive to the different reality experienced by women. Teaching the concept of "mistake of fact" by use of the *Pappajohn* case (mistaken belief in consent to rape) makes it extremely difficult for a female student to come to terms with the legal concept. Selection of a different teaching case (say, a drug possession case) to illustrate this concept would prevent her learning being prejudiced or impaired.

Sex, race and culture should be taught as part of underpinnings of law. Burden should not be on students to raise the issues; professors should set the tone to make this analysis possible. It is good to have students contribute to discussions on curriculum, but where there is lack of expertise on the faculty in these areas, extra burden has fallen on students affected by or interested in those issues to design a course.

Students already marginalized should not be additionally burdened with the responsibility to create courses allowing them equality of academic treatment. It should not be their job to "set the record straight." There is insufficient funding for

such research or design. We need more funding and increased appointments of faculty who can teach these areas from an authentic experience.

Courses could be team-taught to ensure all relevant perspectives are brought to students by people with direct experience. Law schools could invite (and pay) representatives of women's, native, visible minority groups to teach sections of the law or modify curriculum. Professors sensitive to these issues already on faculty could share a course with a more traditionally minded professor.

Hire more female law professors, representing the different ethnic, racial, native, and sexual orientation groups to teach law. More small group teaching, team-teaching, and participation of students in curriculum design. Let them set some of the agenda. Specifically prohibit sexual or other harassment in the law faculty. Harassment is not confined to female students. Female professors are harassed by male colleagues, as well as by male students.

Legal education must include questioning the assumptions behind legal rules, i.e. what social assumptions generate a rule of evidence which in practice is prejudicial to women?

The best airing of the issues is presently occurring at the law schools, in discussions among deans, legal educators and students. New law graduates are coming out with a more critical perspective, but there must be more integration of the practising profession with the law school to prevent vertical separation in the profession.

May be important to start teaching sensitivity to gender, race, native, sexual orientation issues well before law school, ie, in grade school.

2.3 Judicial Education

We need to improve funding for legal education at all levels, and also find ways to motivate attendance of judges and practitioners at gender-sensitization courses. Education at all levels is important, but judges have a particular responsibility to become educated now, and not wait for incremental social change by generations.

It is hard to make judicial education mandatory. It flies in the face of judicial independence, but pressing for more new, younger appointments to the bench from groups whose perspective is lacking in law would help. We might seek turnover on the bench on a 10-year basis. Judicial independence is of crucial value to retain, as judges must be free to make unpopular decisions (including progressive ones).

The most important agent for change may be getting senior management at all levels to commit publicly to changing a sexist legal system. Get chief justices involved in the planning of gender-sensitization courses, and judges will attend because they understand it has become necessary or advisable to do so. If judges' peers and superiors are making gender issues a priority, judges will bring themselves up to date. Hierarchy and promotion are relevant here, as is not wanting to be the "odd one out". For the federal minister of Justice to have made the statements she has is a crucial factor in attitudinal change.

Judges are trained to listen and observe; to decide on the basis of proven facts. The more women can make it clear to male judges that "this happens to me simply because I am a woman", the more a judge can make legal findings reflecting that reality. A judge can learn that a minor physical assault may coexist with a major emotional trauma, and he can make criminal or civil judgments accordingly. Specific, identifiable facts showing women's reality will change law gradually.

It can be very hard to get this across. Criminal injuries compensation case excluded battered wife's injuries, and found no inequality on the basis of sex. It was argued before them that this injury happened because she was a woman but the criminal injuries board didn't accept that argument. This may raise the question of teaching trial techniques; how to get your message across to a judge uninformed on these issues, to simplify the message and make the proof clear.

There is a lot of good information out there. Women have worked collectively for decades to document and prove the facts of women's oppression. It should be the judges' obligation to make themselves aware of it.

2.4 Legal Profession

Legal educators are a somewhat incestuous group; our errors are due to a lack of comment from others. We need to find ways to get concurrence of the members of the bar to the issues we want to raise. Female lawyers still face sexual harassment, make complaints to the law society, achieve little in the way of useful results. Law societies must take direct action on these issues.

Law societies should be required to involve themselves in gender and related issues and should not be confined to "women's issues" - parental leave, etc. are "family" issues, and should not be presented as only appealing to women's interests. More male lawyers could be on side if similar kinds of leave were shown to be advantageous to them.

It is important to remember that even professional women only acquire a "provisional" status. A female law professor, with the status and social protection that goes with the title, becomes again merely a woman alone if she is out on the street in the evening. This is even more true for women of colour.

2.5 General

There is also a need to educate decision-makers at the administrative level. Many decisions are now made not in court but by administrative tribunals of various kinds. Relaxed rules of evidence and less formal procedure are needed. It may be even more important to ensure these people are sensitive to issues of gender, race, ethnicity, native status or sexual orientation, since the due process protection is less evident.

Objectives:

- to bring those working in the field of education, faculties of law, bar associations, judges (and federal and provincial ministers of justice) to become aware of the needs of society in general and of women in particular by being attentive to the various groups expressing these needs;

- to bring those involved to join forces among themselves and with other groups expressing women's needs with regard to the administration of justice.

OBSTACLES

Axiom of education: the only education that is effective is that which is relevant - or responsive to students' actual sense of their needs.

1. Law School: Law schools are committed to scholarly understanding of legal system - and to preparing for professional role. In this enterprise all sorts of critical perspectives (including feminism, anti-racism, etc.) are relevant and are responsive to the intellectual curiosity of most students.

2. Bar Admission Course: What is of foremost relevance to B.A.C. students is ability to conduct basic legal transactions, and in the context of this very focussed educational purpose, the educational agenda of feminism or anti-racism will be seen as less relevant - and will be less effective

3. Continuing Legal Education: The raison d être of C.L.E. is to learn how to perform specific legal transactions more efficiently and with a better grounding

of legal knowledge. C.L.E. programs can introduce feminist perspectives but there cannot be C.L.E. programs organized around providing a feminist perspective on, or feminist critique of, say, criminal law.

4. Judicial Education: What seems to be relevant to judges is administering a system of justice - a system that is just. Hence, judges do seem to see as a relevant, understanding the impact of the differential distribution of power and wealth. Hence, gender and class education is seen as important by many judges and will, therefore, be effective.

3. Recommendations for Change

Participants were asked at the end of session #4 to bring with them to Session #5 one or more recommendations in writing. These were then presented by each participant, and discussed within the group to determine whether a consensus existed. For the majority of recommendations, consensus was achieved.

I - LAW SCHOOLS:

RECOMMENDATIONS:

1. A policy statement be made by Council of Law School Deans with regard to eradication of sexism, racism, ableism and other types of institutional and attitudinal barriers to participation of women in law school education.

2. A program with goals, target and time tables to implement and bring the policy into reality. The program should include the following:

   - review of curriculum
   - policy guidelines on elimination of discrimination in law school
   - hiring of law teachers from disadvantaged groups

3. Professional Development program for law teachers.

4. That the Council of Law School Deans consider the report entitled "Equality in Legal Education... Sharing a Vision...; Creating the Pathways" produced by a special advisory committee to the Canadian Association of Law Teachers.

5. To challenge the assumptions inherent in legal rules:

   i) how (method): alternative pedagogies, experiential learning, evoking students in decisions around curriculum, team teaching, group discussions, tutorials, use of videos, vignettes.

   ii) what (curriculum content): integrated materials on race, class, gender, sexual orientation and ability in case material (fact situation)

   iii) who (composition of faculty/instructors): affirmative action, guest lectures, consult with target groups women, native, black, lesbian/gay, representatives from National Anti-Poverty Association

6. Provide adequate funding for legal education:

   - to hire faculty which represent the diversity of society in sex, race, class, etc.
   - to hire full-time academic support staff to make it possibile for "non-traditional" students to succeed.
   - to provide non-academic support for law students

7. That the law school curriculum integrate issues of gender race and class. That the cases chosen do not become barriers to women's learning experience.

8. That women and women of colour in all law schools be reflective of the population. That would be both in law students and law professors.

   - to hire an increasing number of women, especially women beginning their careers, to give courses

   - to create small discussion groups, in addition to lectures, that will allow women students to speak

   - to no longer marginalize feminists who give courses

   - to prosecute harassers

   - to construct an analysis chart that will make it possible to eliminate gender bias in course marking

9. Perhaps this is unrealistic in light of the deficit and national debt, but Department of Justice should fund for six years (until the retirement of older male law professors), one appointment at each faculty of law of one young

academic identifiable by gender, race (visible minority), disability, or sexual orientation and to support more research and teaching commitments include the legal process and gender, race, disability or sexual orientation.

10. That an experimental model (i.e., one involving contact and the creation of relationships between the student and the person about whom they are to learn) be adopted as a standard part of judicial, continuing legal and law student education.

    The model should be used, together with other techniques (e.g., panel and lecture presentations), but it should be honoured and not considered as an "experimental" or "radical" approach.

    The model has particular importance in dealing with aboriginal, gender and multicultural education. But, it should be extended to include education on the condition of people within the community who experience a life different than the decision makers (judges, lawyers etc.)

11. That a mechanism or mechanisms be developed to enable law schools and law societies to discuss educational goals and the need to promote diversity of experience and opinion. Representatives of the judiciary, ministries of justice and departments of Attorneys General might participate from time to time as current issues of interest warrant.

RATIONALE

Law School education is frequently looked at by the bar as unreal (the ivory tower v. the real world) and this attitude has a strong influence on students. When law schools attempt to encourage broad discussion and wide-ranging professional experience, students will respond according to how they see these discussions as potentially bearing on the career choices open to them.

SAFETY OF WOMEN ON CAMPUS:

That the safety of women on the campus be recognized as a necessity so that women have an equal opportunity with men to learn. Academic work is not possible in the context of fear.

HOW TO DO:

- Visit to President and Vice-President of Student Affairs to articulate the concerns of the group.

- Meetings with:
  - Student Housing officials
  - Sexual Harrassment Officers
  - Head of Women Students Office

RECOMMENDATIONS:

That, as a means for changing attitudes through legal education, all providers of legal education should:

- adopt small-group experiential learning methods, consult and employ the experience of women and minorities in the design and delivery of experiential learning

- plan for reinforcement of attitude change through a "building block" approach in later education and on-the-job training.

- research the educational outcomes of educational design on issues of gender bias in order to determine what methods have the greatest impact.

That the Department of Justice fund a pilot project in one jurisdiction that models experimental learning methods from law school through continuing legal education and judicial education.

- monitor and evaluate the project

- use the Joint National Committee on Legal Education (joint body of the Council of Canadian Law Deans, the judiciary and the Federation of Law Societies) to monitor and promote the experience of a pilot project.

- pilot project approval and funding by July 1, 1992.

II - EDUCATION FOR THE GENERAL PUBLIC

RECOMMENDATIONS:

1. That all recommendations have a timeframe, designated person(s) responsible and criteria for success/failure within the Ministry.

2. That those working in the field of education develop a means of intervening effectively at the secondary school level in the common law provinces and at the CEGEP level in Quebec.

   "Those working in the field of education" means those persons involved in legal education at various levels.

   Subjects to be dealt with:

   - equality between the sexes
   - respect for different cultures
   - spousal abuse
   - forms of sexual abuse
   - safety for women on university campuses

3. Develop a set of guidelines/checklist to screen

   a) curriculum material and teaching methods
   b) legal procedures and practices.

4. Create an inventory of available sensitization training programs (not just university based education programs) so that an appropriate program mix can be put together as the training need or occasion demands.

5. That responsibility for co-ordinating education programs be limited to a few organizations. In order to reduce public expenditure, that duplication of effort be avoided, and that exchanges of information among the various persons working in the field of education be facilitated.

6. Set up an "independent" legal/judicial education fund (financed from a diversity of sources including associations of lawyers, the Law Foundation, etc.) to fund legal judicial education.

7. Provide a list of legal and judicial bodies/associations to major organizations representing issues of women, racial minorities, aboriginal people and persons with disabilities, so they can provide the legal bodies/associations with issues related information on an ongoing basis.

8. Education system ensure that from K-12 respect for gender, race, class is integrated into the curriculum. Including dispute resolution.

9. Because attitudes are vital, and because attitudes are formed and in many ways fixed long before girls and boys become women and men, it is important

to devise and implement strategies and programs at the primary and secondary levels of the education system.

This will require a multi-disciplinary approach, people with educational expertise, commitment at the highest levels and the money resources to do the job.

A) Silencing should be addressed. Respect must equally be given to all points of view in all programs in law schools, judicial education, etc. Rightfully, much concern has been expressed for the voice of the disadvantaged - but in this concern we are losing sight of and respect for those holding traditional values who must be permitted to enter equally into the public debate and be treated with respect and acceptance.

B) Women's experience varies with the individual, i.e. there is no such thing as a single common point of view amoung women. Thus, all programs and appointments - university and otherwise - might not be restricted to the views of only one special interest group such as feminists, as the views of all women have validity and must be given equal respect and acceptance.

10. Leaders be commended for and encouraged to actively participate in leadership roles:

- Ministers of Justice and Education (federal and provincial)
- Chief Justices
- Judges
- Deans

III - JUDICIAL EDUCATION:

That Judges be reminded of their responsibility to the Society that they serve in administering justice to that society in a fashion that both ensures fairness to all litigants and preserves the necessary independence that Judges require to give judgements.

While mandatory education for Judges is problematic, the availability of programs on gender education, adequately funded, together with the authority generally held by Chief Justices and Chief Judges to schedule trial judges to attend such programs is the only real answer to getting Judges to assess, and adjust themselves where necessary.

RECOMMENDATION:

Mandatory training of all judges on the issues of gender equality and factual information on women's realities.

FINAL REPORT

NATIONAL SYMPOSIUM ON WOMEN, LAW, AND THE ADMINISTRATION OF JUSTICE

REPORT OF DISCUSSIONS AND RECOMMENDATIONS REGARDING WORK AND GENDER (TRACK C.3)

BY MARIE-FRANCE BICH, FACILITATOR

JUNE 10-12, 1991
VANCOUVER, BC

GENERAL COMMENTS

It is difficult to summarize in a few lines the ideas generated in the sessions but I will try and give you the essence of what was discussed.

First, some general comments about the make-up of the group and the dynamics of the sessions:

1. There was a good mix of participants representing a variety of interests: lawyers (both mothers and non-mothers), judges, professors, big "C" corporate lawyers, lawyers in private practice or legal aid, gay rights supporters, and so on.

2. The priorities for action differed, and some very divergent solutions were suggested in terms of lifestyles, career paths, and so on.

3. All present were in agreement that men must play a vital role in the dialogue to eliminate gender discrimination, which is not just a women's issue, but a social issue.

4. Although our primary focus was not the substantive law, everyone agreed in our discussions that amending the laws is only a small part of the resolution of the problems of sexism, racism and discrimination in general. Everyone agreed that the real challenge is to change societal attitudes to women, women of colour and disabled or poverty-stricken women, and to work towards a more tolerant and supportive culture. Secondly, there was much discussion about the process of creating policies and passing laws and about the fact that most of them are developed by men and do not reflect women's realities today.

5. Almost all the participants were willing and even determined to continue their role in the process. They all wanted to participate in future fora to ensure that momentum is maintained.

6. The last general comment is that all participants were very concerned about the "next steps". Everyone was worried that the ideas and recommendations generated in the working sessions would be put on the shelf and not implemented.

UNANIMOUS RECOMMENDATIONS

The following recommendations were made unanimously:

1. Federal funding for legal aid must be increased, especially for family and civil issues. Women involved in these types of conflicts, especially custody battles, tend to suffer the most, because often they cannot afford the services of a private lawyer and are therefore at the mercy of child welfare workers and the court system.

2. Affirmative action programs are needed at all levels of the judiciary, in university faculties, law firms, professional associations and any other areas where women are under-represented in relation to their representation in the general population.

3. Sensitization of the judiciary and of members of professional associations to gender equality and discrimination issues is absolutely necessary.

4. It is necessary that workplace policies be adopted to accommodate the concrete reality of women who are juggling a career and family life (for example, flex time, job sharing, sabbaticals, standardization of maternity and paternity leave, and so on).

5. There must be zero tolerance of sexist behaviour (including sexual harassment) or discriminatory behaviour in any form.

6. The plight of immigrant and native women received much attention from the group with respect to their inadequate access to the justice system (language barriers, insufficient education regarding court procedures, and so on). The group also emphasized the need for better correctional systems for women and for more appropriate education of incarcerated women to enable them to continue their studies or learn a trade that will be useful when they are released.

GENERAL RECOMMENDATIONS

The following is a list of the recommendations raised by the participants in the session on work and gender.

The recommendations below, even when aimed at women in general, also pertain, where applicable, to native women, immigrant women, visible minorities, women with

physical or mental disabilities and any individual who is discriminated against on the basis of gender, colour or sexual orientation.

Legal Aid

The provinces and territories and the federal government should join forces to address the problems associated with insufficient legal aid, especially in family matters. Women are the ones who suffer the most, as they are unable in most cases to afford the services of a private counsel. A lack of legal representation in custody cases can have grave consequences. Women are frequently at the mercy of child welfare workers and often lose their children; they receive inadequate support payments even when granted custody, and are not awarded their just share of the marital property. These problems are made worse by a lack of legal representation. The recommendations are as follows:

1. Increase federal involvement in legal aid, with emphasis on civil and family issues, and provide for federal contributions when the provinces' and territories' resources are insufficient.

2. Encourage the federal government to urge law foundations, especially the law societies, to supplement the civil legal aid budget of the provinces and territories.

3. Recommend that legal aid fees be increased to levels that are closer to the rates generally in force in the private sector, to give clients better quality service and to provide a wider pool of interested lawyers.

4. Encourage law firms to set guidelines with respect to "pro bono" work, and when such work is encouraged by a firm, urge that a mandatory number of "pro bono" hours are devoted to legal aid cases.

The Judiciary

Further recommendations are:

5. Set up an affirmative action program supported by the Canadian Judicial Council to

    a) ensure the priority appointment of women to the bench at all levels and to administrative tribunals, and

    b) adopt policies that will facilitate the advancement of women within the judiciary. Women's representation in these positions should correspond

to women's representation in the general population (currently 51 percent).

6. Review the criteria for the appointment of judges, and consider waiving or amending when necessary the requirement for 10 years in practice. This criterion automatically eliminates many women who would otherwise be eligible and considerably lessens the chances of equity on the bench in the short or medium term.

7. All levels of government should make a policy statement that politics are not a criterion for, and should not be considered in, the making of judicial appointments. Naturally, governments should act accordingly.

8. Make pension plans for judges flexible so that a lawyer who is not interested in a 10-year appointment is not tied in to a long-term pension plan.

9. Encourage the judiciary to assume a leadership role by adopting policies regarding part-time (not supernumerary) benchers.

10. Institute a code of ethics for the judiciary (if one does not already exist) that expressly prohibits all forms of sexism and sexual harassment and any other form of discrimination.

11. Set up a mandatory judicial education/sensitization program on open and subtle sexism and discrimination based on race, gender, sexual orientation and physical or mental disability.

12. Have the Canadian Judicial Council adopt a responsive attitude towards complaints of discrimination made with respect to benchers, and find a process to deal with these complaints that will not interfere with the independence of the judiciary. This process could take the form of a special committee to vet complaints of sexism and sexual harassment.

Education

Further recommendations are:

13. Institute an affirmative action program for law faculties to ensure a strong female presence on the professorial staff. It is hoped that by the year 2000 women will account for 50 percent of the professors in law faculties.

14. Have law faculties offer part-time legal education, which would allow women to attend law school and still raise their children (especially practical for the many lone parents).

15. Encourage law firms to address the student body at various law faculties about what to expect in their firms and give the students the opportunity to enquire about issues such as flex time, maternity leave, job sharing, policies on discrimination and any other information they have a right to know before considering a long-term career in a particular firm.

16. Incorporate the realities of private practice into the law school curriculum and into local bar admission programs, so that students are fully aware of what awaits them.

17. Re-examine the student loan and bursary programs to ensure that :

    a) the criteria used to determine the amount of the loan or bursary reflect the special needs of refugees and immigrant women;
    b) consideration be given to child care expenses, where applicable;
    c) the amount of the loan or bursary not be deducted from family allowance or welfare payments;
    d) women not be assessed on the basis of their husband's income, to which they often do not have access for their education;
    e) repayment of the loan not begin until after the first six months of practice.

18. Have law schools offer special scholarships to fund the upgrading process of immigrant lawyers, as required. Special attention should be paid to women in this situation. Often they cannot afford the tuition fees for such training because they cannot work while taking courses because of child care responsibilities, or because they have no access to their husband's earnings.

19. Have the law societies assist women with continuing legal education while they are on extended leave (for example, child care leave) so they do not to have to re-sit the bar admission exams after a three-year absence from practice.

20. Have the law societies reimburse bar fees, on a pro-rata basis, during child care or maternity leave.

21. Have the law societies and law firms encourage the analysis of women's career paths and the choice of practice area when presenting career day programs.

22. Have the law societies and professional organizations sponsor legal education programs on gender equality and discrimination.

23. Have the law societies set up and implement sensitization sessions or programs which would address the special problems of women, especially women with disabilities or women from visible minorities. Such programs should be instituted in firms, educational institutions and any other forum where such sensitization is needed.

24. Impose ethical standards for all universities and teaching faculties that would prohibit all sexual harassment, sexism, and discrimination based on race, colour, gender or sexual orientation.

25. Establish nationally acceptable standards regarding the portability of law degrees and the conversion of foreign law degrees.

Workplace Accommodation

The following recommendations address the problems associated with the inadequacies of the present-day workplace for benchers, professors and private practitioners alike, and the need to provide women with a career lifestyle compatible with their personal and family life.

Workplace policies, as they now stand, have resulted in a significant number of women abandoning the profession (approximately 37 percent per year). The reasons often given are frustration, job dissatisfaction and the impossibility of combining work and home life in a harmonious fashion. The following measures must be taken:

26. The Canadian Judicial Council should recommend experimenting with part-time positions within the judiciary which could then serve as a model for law societies, law firms and universities.

27. The law societies should promote the implementation of workplace accommodation policies for law firms so that maternity leave, paternity leave, flex time, job sharing, sabbaticals and so on are systematically instituted. There should be a requirement that these policies be adopted by the law societies and be made available to the public.

28. The law societies should address, in the bar admission or continuing education curriculum, the issue of working conditions, of which a few examples are given below.

29. Policies regarding flex time, job sharing, and so on should be added to the mandate of law firm management committees.

30. Parental and maternity leave should not be merged, as they meet distinct needs.

31. The law societies must set mandatory minimum standards for maternity and parental leaves and, if and when necessary, their enabling legislation should be amended to allow the enactment of such standards.

32. There should be nation-wide standardization of maternity leave policies in law firms, with a mandatory minimum leave period for individuals exercising their right to take leave.

33. Solutions must be found to respond to the inability of small law firms to financially support maternity and paternity leave, perhaps through negotiations with insurance companies to cover this leave of absence.

34. The law societies, law firms and the judiciary should examine the implementation of job-sharing as an option for individuals rearing children. Such a program is already in place in Quebec for notaries. With respect to specialized areas of law, a firm policy could be adopted that would require a lawyer desiring to take leave to ensure that his or her locum replacement would have the required level of specialized experience.

35. Law firms and the judiciary should promote a policy giving every individual, regardless of gender, the right to a sabbatical every four or five years for a specified period of time.

36. The law societies should set up day care facilities. They already provide a number of services such as travel services, car insurance, life insurance, reductions on hotel rooms and so on. Day care services, which are just as essential if not more so, would be greatly appreciated.

General Recommendations

37. The law societies should undertake to set up commissions and working groups to examine sexism and racism within the legal profession.

38. A parliamentary committee should be established to examine problems relating to discrimination against women with physical or mental disabilities who are thereby in a situation of double jeopardy, and a report of the committee's findings should be published.

39. The Canadian Judicial Council should establish a formal but independent committee to deal with complaints of sexism and sexual harassment within the judiciary.

40. The federal Minister of Justice should encourage the law societies and professional associations to set up a standing committee, with representation from private firms, to deal with gender discrimination issues.

41. Federal policies requiring that certain contracts be awarded on the basis of employment equity considerations should extend to contracts for legal services. Provincial and territorial governments should, if they have not already done so, adopt similar employment equity policies.

42. The law societies should liaise with other professional associations, including legal ones, to develop complementary policies with respect to discrimination based on gender, race, physical or mental disability and sexual orientation.

43. It is recommended that acts of sexism and sexual harassment be expressly named as prohibited conduct in codes of ethics for lawyers and judges and, further, that all provincial and federal professional codes of ethics be revised to reflect these prohibitions.

44. Heterosexist bias and homophobia must be eliminated from the justice system and laws entrenching heterosexual privileges must be amended (tax law, family law and so on).

45. There should be a right of refusal to represent an individual accused of sexual assault.

46. A federal program should be instituted that is aimed at increasing female representation in leadership roles in business and in the community. This would ensure that women would be in positions that enable them to be the agents of social change.

47. There is a need to involve men in the dialogue and in the process of eliminating gender discrimination because it is not a women's issue, but a social issue.

48. A formal follow-up plan of action must be established to address the implementation of the preceding recommendations and a precise timetable for taking positive steps must be set.

IV

RECOMMENDATIONS FROM DELEGATES FROM ORGANIZATIONS DEDICATED TO WOMEN'S EQUALITY TO THE SYMPOSIUM ON WOMEN, LAW AND THE ADMINISTRATION OF JUSTICE

RECOMMENDATIONS

from

delegates from

organizations dedicated to women's equality

to the

symposium on

Women, Law and the Administration of Justice

Vancouver, B.C.

June 10 - 12, 1991

A. Appointments and education of judges and others

1. Employment equity standards should be applied to judicial, quasi-judicial and administrative tribunal appointments.

2. Just as judicial appointments do not reflect the diversity of the population, nor do appointments to legal services society boards, law foundation boards, or law reform commissions. Appointment systems should ensure that more women, including aboriginal women, minority and immigrant women, women with disabilities, and lesbians are appointed to these influential positions.

3. Northern justice is being delivered by southerners. Judges and lawyers are southerners. Northern lawyers who have the requisite number of years at the bar to be appointed as judges are not being appointed. No judges speak aboriginal languages. Appointments to positions in the justice system in the north needed to be carefully scrutinized: more northerners, more women, more aboriginal persons are needed.

4. Research should be undertaken regarding the composition of commissions and human rights adjudication panels and the qualifications of their members.

5. Maternity leave and child care issues for women in the legal profession must be addressed if women are to take an equal place in the profession and on the bench.

6. In the throne speech, the federal government announced that there would be a blue ribbon panel on family violence appointed. Women's organizations must have input into the designing of the appointment process and the selection of this panel.

7. More feminist judges should be appointed. Selection processes should be reviewed to determine whether there are barriers to the appointment of women. Processes and criteria should be altered if necessary to ensure that feminism is a positive not a negative factor in the selection of judges.

8. A new procedure should be devised for appointments to the Supreme Court of Canada which will guarantee women's input. There should be public scrutiny of credentials of nominees. Women should be able to make recommendations, and question candidates.

9. There must be mandatory judicial education at all levels on issues of gender, race, class, disability and sexual orientation.

10. There should be a code of ethics for judges.

B. Access

1. Women must have access to the use of their Charter equality rights. At the present time, women cannot challenge Charter violations which result from provincial laws, programs or practices because there is no funding to support such challenges. Provinces should opt into the Federal Court Challenges Program, by providing funds to it and agreeing that individuals and groups can apply there for funds to support test cases in their jurisdiction.

2. The justice system must be accessible to women with disabilities. This means that courts and legal aid offices must be physically accessible to those with mobility, hearing or visual impairments; it also means that professional interpreters for deaf people must be available and that other interpreters or support persons for people with disabilities must be recognized (such as: bliss symbol interpreters, support persons for persons with mental disabilities, etc.).

3. The justice system must also be accessible to women who do not speak either english or french. Aboriginal women and immigrant women, whether they are witnesses, victims, or accused persons, need to understand and be able to participate in judicial procedures on an equal footing. This means that adequate interpreter services must be available and that information materials are required in languages other than english and french. In addition, adequate interpreter services must be available to members of francophone and anglophone minorities who live in areas where services are not ordinarily available in their language.

4. As well as addressing the sexist bias in the justice system, it is important to address the heterosexist bias in the system. Tax laws and family laws entrench heterosexual privilege. Lesbian women face losing custody of their children. Lawyers and judges who are gay and lesbian are not able to come out of the closet because of the homophobia within the profession. Law students who are lesbian feel vulnerable and uncertain about whether they can be successful in their chosen profession. Any

review of the justice system and its impact on women must deal with these issues.

5. Adequate legal aid funding for family law matters must be available. Poor women are the victims when legal aid funding for family law cases is inadequate.

6. All provinces and territories should immediately increase their legal aid tariffs for civil (family law) matters.

7. Education is needed re: rights and procedures. Many women do not know that they can go to court for maintenance, for example. Education has to come through communities. This means that aboriginal, minority and immigrant women need to be trained to provide information to their communities.

C. An aboriginal justice system

1. Aboriginal people should be allowed to develop their own justice system. They do not receive justice from the white justice system.

D. Racism

1. Any feminist analysis must be informed by the recognition that gender identity is predetermined by many factors and cannot be determined exclusive of race, culture, ethnicity, class, sexual orientation, ability, language, etc.;

   Racism and racial discrimination exist as pervasive material realities in our daily lives;

   The legal process denies and fails to recognize the existence of racism as a material reality;

   Therefore we recommend:

   i) that the *Criminal Code* be amended to provide

      a) that acts of racism be deemed to be aggravating factors in the commission of any crime, and,

b) that a criminal act committed in response to an act of racism be deemed to be mitigated;

ii) that any government initiatives in the area of racism be undertaken only after the meaningful participation of the affected communities.

E. Poverty

1. Since justice for women requires an end to women's poverty, governments should immediately cease introducing measures which deepen women's poverty and repeal all recently introduced measures which contribute to it, including the cap on transfer payments and amendments to the *Unemployment Insurance Act*.

2. The *Canada Assistance Plan Act* should be amended to guarantee that persons in Canada who are in receipt of social assistance are not required to live on incomes below the poverty line for their area.

F. Family law

1. Fathers who kill or beat their wives are getting access to their children. Any background of violence should be an essential part of assessments regarding custody or access to children. In addition, research is needed regarding the incidence of women who are losing custody of children to men who are batterers.

2. The *Divorce Act* and all provincial and territorial legislation dealing with custody and access should be amended so that violence by one spouse against another is explicitly deemed to be relevant to the determination of custody and access issues. (See Ontario's Bill 124 for draft legislation).

3. Section 16 of the *Divorce Act*, the "friendly parent rule" should be repealed immediately.

4. Often women are at a disadvantage in custody disputes when they have a career to which they devote time. Women are also at a disadvantage if the father has a new wife who does not work, or if the woman is involved in a lesbian relationship. Canadian research is needed regarding the various manifestations of sexist and heterosexist bias in

custody decisions. Treatment of these issues should be incorporated into judicial education programs.

5. The sexual orientation of any person applying for custody and access should be deemed irrelevant to such applications.

6. When women do not report child sexual abuse but are found to be uncooperative regarding a father's access to children they are often penalized by courts, sometimes by having custody changed. Research should be undertaken to determine why women do not report child sexual abuse, what happens if they do, and what happens if they do not.

7. Treatment of past psychiatric history as a factor in custody cases should be reviewed.

8. National data should be collected re: the economic consequences for women and children of divorce or separation.

9. A federal task force is developing guidelines for child support orders. The purpose of these guidelines is to set standards amounts which reflect the costs of raising children for use by courts making awards. American and some Canadian research sets the amounts at unrealistically low levels. New feminist research is needed to set adequate standards for the Canadian system. Women needed to be formally consulted regarding the adequacy of any guidelines before they are distributed or implemented.

10. Southern standards for support awards are used in the north where costs of food and services are much higher. This discriminates against northern women, and, in particular, aboriginal women. Support awards should reflect the cost of living of the region.

11. No federal, provincial or territorial legislation should include provisions with a presumption of or preference for joint custody.

12. No province or territory should require participation in mediation as a condition for obtaining or maintaining legal aid.

13. Public funding must be made available for the creation and maintenance of facilities which provide supervised access visits and safe transfer, and staff employed by such facilities must be appropriately trained.

14. Persons providing mediation or custody and access assessment services should be regulated and the terms of their regulation should be developed in consultation with feminist service providers.

15. Maintenance enforcement programs must not require women receiving social assistance to cede their legal rights to the state as does, for example, the B.C. system.

16. The federal-provincial-territorial working group should research the effectiveness of existing government-funded support enforcement programs, including their impact on poor women, and make recommendations to women's groups regarding improvements to existing systems.

17. The Canada Pension Plan (not including the Disability Pension nor the Quebec Pension Plan) should be amended so that credits are split automatically upon separation, without the necessity of application, and, further, the Canada Pension Plan should be amended to prohibit provinces or territories from passing legislation which enables parties to contract out of the division of credits.

18. The *Income Tax Act* should be amended so that child support payments are no longer included in the recipient's income.

19. The federal-provincial-territorial working group is urged to coordinate the introduction of legislative measures in all jurisdictions which will provide for the division of all pension credits at source on breakdown of the relationship.

G. Violence

1. Support services for women must be available and adequately funded. Women cannot leave homes where they and/or their children are being battered or abused unless there are places for them to go.

2. Judges should not be allowed to punish women who refuse to testify. If there were adequate backup services and women were assured of a safe house and protection from the batterer against whom they are required to testify, such decisions might be acceptable. In the absence of such guarantees, it is unacceptable to penalize women; they have no adequate way to protect themselves from the batterer.

3. National data is needed regarding the sentences given to men who batter their wives as compared to men who are sentenced for other assaults. Research should include examination of what factors are considered by judges when sentencing batterers as opposed to men involved in other assaults.

4. When immigrant women who are on visas are battered, they are unlikely to protest because their marriage sponsorship can be withdrawn. While landed immigrant status can be granted on compassionate grounds, this does not always happen. Research should be done which will reveal the pattern of decision-making of immigration officers when battery or some other physical or psychological abuse is occurring to particularly vulnerable immigrant women.

5. Women of colour who come to Canada as domestic servants or mail order brides are especially vulnerable. They do not know how to get access to the justice system, they do not know their rights, they are isolated, and they are afraid. Any woman who comes to Canada on this basis should be provided with an orientation which will explain rights, and how to use them. Each woman should be provided with contacts, and names of service providers. Research should be undertaken to explore other ways of providing protection to these particularly vulnerable women.

6. Sexual mutilation of children is taking place in Canada. A review should be undertaken to determine whether current laws adequately address this problem, and to ascertain whether there are other steps which should be taken to prevent this abuse.

7. Judges have considered culture a mitigating factor in some cases where assault or abuse is involved. Where women and children are threatened, any cultural justifications must be ignored.

8. Transition houses and services for battered women and rape survivors must be accessible for all women with disabilities. This means that physical facilities must be accessible, that services must be provided for women who are deaf or blind or who have a mental handicap, and that the staff of transition houses must be sensitized to disability issues.

9. Recognizing that people with disabilities are substantially more vulnerable to abuse than non-disabled members of our population and that the majority of the victims of abuse are women with disabilities:

It is resolved that:

i) changes should be made to the *Canada Evidence Act* so that people with disabilities who have difficulty communicating, being understood, or who have a mental disability, be given greater opportunity to give evidence and be provided with support services of their own choice such as interpreters and attendants; and

ii) people with disabilities should be given the opportunity to testify behind a screen, and to give evidence on videotape for cross-examination later in the courtroom setting.

10. There should be no mediation where family violence is involved. Women are too vulnerable to protect their own interests in such circumstances. Research should be undertaken on the criteria for mediation, its current use, and the results for women.

11. If the Supreme Court of Canada strikes down the rape shield provisions in the *Criminal Code* in its decision on *Seaboyer*, the federal government should be prepared to introduce new legislation immediately which will continue protection to female survivors of sexual assault.

12. Improving the treatment of witnesses should be considered a priority. The case of Kitty Nowlak Reynolds highlights the negligent treatment given to witnesses in the justice system. Witnesses should be treated with respect, informed of events which affect them, and protected effectively when they are vulnerable to repeated violence, abuse, or psychological harm.

H. The *Criminal Code*, gun control and prisons

1. The *Criminal Code* provisions regarding prostitution should be repealed. Their effect is to criminalize women because they are poor and live in a sexist society.

2. Gun control legislation should be made stronger. Women who are murdered in their homes are shot with hunting rifles. Gun storage should be required away from homes and cities.

3. The prison system for women in Canada is unacceptable. Thorough reform is required.

I. Human rights

1. The human rights system is very important to women and must be improved. Poor women need better access to it. Systemic discrimination must be addressed adequately through it, and remedies must be just.

2. Sexual orientation should be added immediately to human rights acts federally and in the Northwest Territories, Nova Soctia, New Brunswick, Prince Edward Island, Newfoundland, Saskatchewan, Alberta, and British Columbia.

3. In order to bring federal and provincial human rights legislation into compliance with the *Charter of Rights and Freedoms*, amendments should immediately be made to expressly prohibit discrimination on the basis of sexual orientation and to strengthen protection for people with disabilities.

J. Child pornography

1. Canada should have laws against child pornography. The U.S. is tightening restrictions on child pornography; steps should be taken to ensure that the industry does not move across the border.

2. There should be laws against involuntary exposure to child pornography. Municipalities which have tried to enact by-laws restricting exposure are considered to be invading federal jurisdiction by passing criminal laws. This problem should be addressed.

K. Personal injury

1. Research should be undertaken regarding damage awards in personal injury cases. Awards to injured housewives and girls reflect their social devaluation because of their sex. Similar research should be undertaken regarding damage awards in medical malpractice cases which are made to women as compared to men.

L. Labour and Employment Issues

1. Poverty for women will not be alleviated or eliminated until women achieve equal access to employment, equal pay for work of equal value and equal opportunity to voice their concerns in the workplace and require that these issues be addressed.

A significant gap in this symposium is the failure to develop and implement a labour and employment law track within which such issues could be addressed. These issues include:

* a complete review of labour legislation as it affects working women specifically. Of particular concern are employment standards issues for women (such as increased minimum wage, comprehensive fully paid parental and family responsibility leaves), workplace health and safety issues affecting women (including pregnancy-related job modification or reassignment, adequate tracking of reproductive hazards in the workplace) and harassment in the workplace (including but not limited to: gender, race, disability, aboriginal origin, sexual orientation).

* employment equity issues, including equity issues affecting aboriginal women, disabled women, immigrant women, women of colour and lesbians.

* strong, enforceable pay equity legislation for both the public and private sectors, in large and small workplaces.

* language and skills training which specifically takes into account women's needs, including the need for child care during training programs.

* legislative frameworks for promoting free collective bargaining, including ways of making unionization more accessible to unorganized women.

* a complete review of unemployment insurance legislation, particularly recent amendments to identify adverse impact on women and lost opportunities to promote the equality of women.

M. Constitutional litigation and constitutional reform

1. Governments must establish a framework for their own equality rights litigation. At the moment governments, with some expectations, are simply defending any law or policy which is challenged. The result is that governments are on the wrong side, fighting against women's equality interests in many cases, and spending millions of dollars doing so. This is not consistent with any commitment to women's equality.

2. Whereas equality-seeking groups have observed that:

   a) the federal government is responding to constitutional challenges by defending the status quo on a systematic basis without examination of the impact of its position on the equality of women particularly in light of evolving jurisprudence, government policy statements on equality of disadvantaged groups, and Canada's international human rights obligations;

   b) the federal government has failed to advance equality arguments in support of legislation designed to promote and enhance the equality of disadvantaged groups;

   c) the federal government has advanced arguments which are not conducive to the development of a consistent and cohesive jurisprudence which will promote the equality of women and other disadvantaged groups;

   It is resolved that the Minister of Justice should:

   i) be accountable for all positions taken by the federal government in constitutional litigation;

   ii) conduct a personal audit of all cases currently in litigation to ensure that the positions taken by the federal government are consistent with her expressed commitment to overcoming the inequality of women;

   iii) ensure that in future, positions taken by the federal government in all constitutional litigation are consistent with her expressed commitment to overcoming the inequality of women;

   iv) ensure that in all cases where appropriate to advance equality arguments in litigation, the arguments are advanced;

v) ensure that arguments are not advanced by the federal government which could lead to constitutional jurisprudence that will have a detrimental impact on disadvantaged groups in Canadian society;

vi) create a central repository for pleadings and facta (of all participants) for all constitutional litigation in which federal and provincial and territorial governments are involved, which repository will be open to the public;

vii) report annually to the standing committee on human rights on all litigation concluded (i.e. appeals finished), which report will summarize all cases in the preceding year and indicate:

- the position taken by the federal government
- the arguments advanced in support
- the result

viii) through the federal-provincial-territorial working group, encourage counterparts in provinces and territories to undertake paragraphs i) to vii) above.

3. The federal government should provide funding for a constitutional conference of women's groups working toward equality to discuss and consult on possible constitutional amendments.

N. Conference concerns and implementation of change

1. Representatives of women's organizations dedicated to women's equality have agreed that the structure and composition of the preconference consultation and the symposium have not adequately represented the needs and diversity of women in Canada.

   Judges, government and legal professionals outnumbered women from community organizations and specific organizations of women were excluded. No women labelled with mental disabilities were invited, nor were representatives of lesbian organizations, women in receipt of social assistance, Inuit women, and women under the Foreign Domestic Program.

In order to have genuine consultation, women of all interests must be involved in the planning process so that the organization, composition, and structure of the symposium are representative of women's needs.

In addition, the Department of Justice must accept the responsibility for covering any and all expenses relating to the participation in this symposium, including the additional cost of northern residents and women with disabilities.

2. There must be an agreed process of accountability for the implementation of recommendations emerging from this conference. Women's organizations must have the opportunity to review them, comment, and monitor implementation.

3. Time lines should be established for government initiatives to remove bias against women from the justice system, setting out when recommendations will be implemented, when implementation will be reported on, and when further consultation with women will be undertaken.

4. Funding for women's organizations dedicated to equality for women should not be cut. Transformation of the justice system cannot take place without interaction between government, justice officials and organizations knowledgeable in the field. If funding is cut, there will be no organizations able to speak for women on these issues. Nor can equality for women be achieved unless women, who do not enjoy equal political power and access to resources, have the capacity to work together and to make their voices heard. Core funding to women's organizations should be restored immediately.

5. All questions of funding are questions of priority. Removing bias against women in the justice system should be a priority for all Canadian governments. The necessary funding to accomplish this should be provided.